TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY, PETITIONER,

vs.

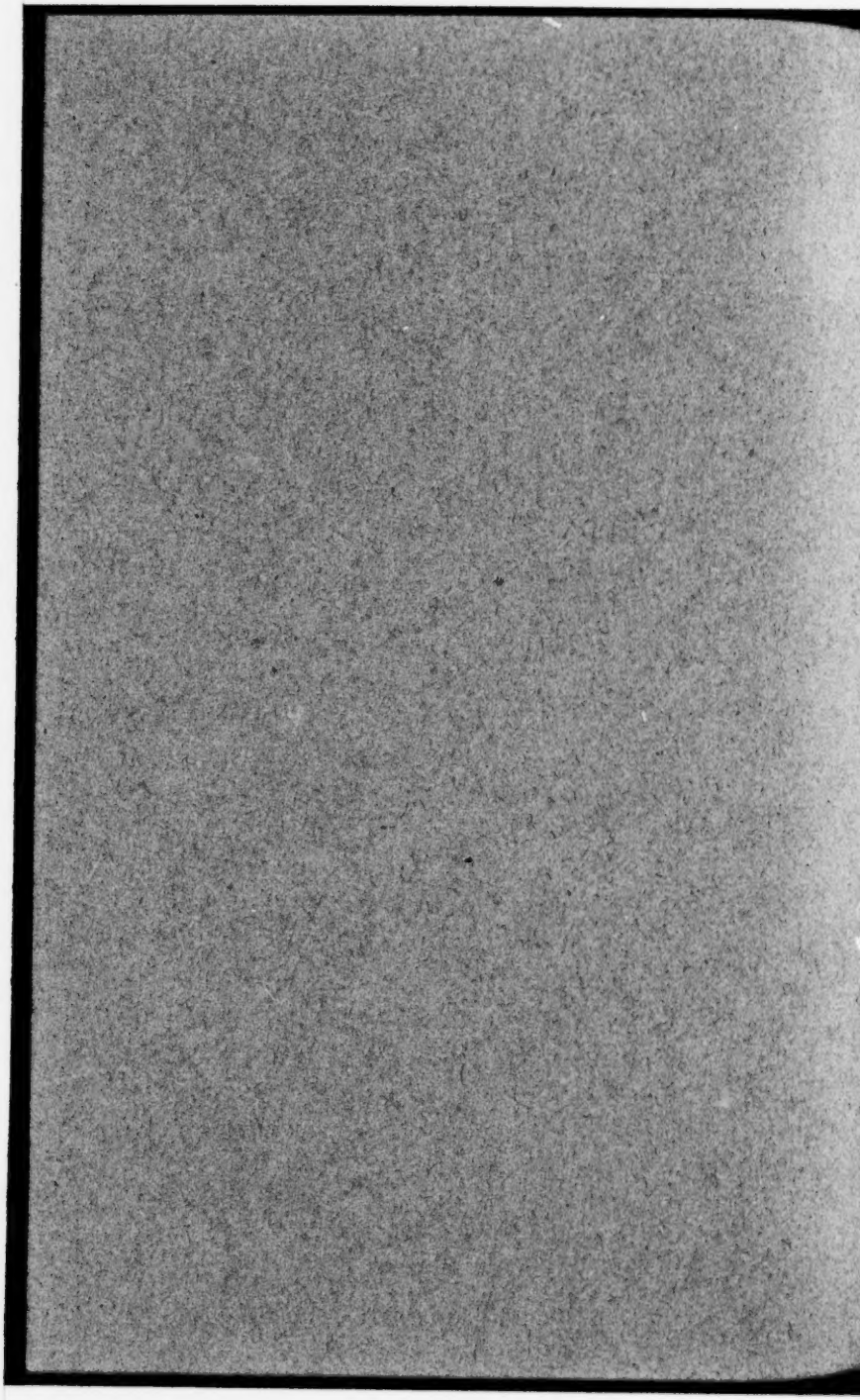
DALZELL TOWING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 14, 1932

CERTIORARI GRANTED MAY 23, 1932

(36,688)



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IN UNITED STATES DISTRICT COURT

SUN OIL COMPANY, Libelant,

against

DALZELL TOWING COMPANY, INC., Respondent

DOCKET ENTRIES

1926.
Oct. 19. Libel filed.
1927.
May 18. Answers filed.
Nov. 1. Amended answers filed.
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Dec. 27. Order substituting proctors for respondent.
1930.
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Feb. 17. Final decree entered.
Apr. 20. Notice of appeal, with allowance, filed.
Apr. 20. Assignments of error filed.
Apr. 22. Appeal bond filed.

[fol. 2] IN UNITED STATES DISTRICT COURT

LIBEL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The libel of Sun Oil Company vs. Dalzell Towing Company, Inc., and against the steamtugs "Dalzellite", "W. F. Dalzell", and "Fred. B. Dalzell, Jr.", their engines, boilers, tackle and apparel, etc., and against all parties intervening for their interest therein, in a cause of stranding, civil and maritime, respectfully alleges:

First. Libelant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey

and at the time hereinafter mentioned was, and still is, the owner of the SS. "Sabine Sun".

Second. The SS. "Sabine Sun" is a large and valuable tank steamer about 429 ft. long, 59 ft. in beam and 4,083 net tons, engaged in the oil trade between Texas ports and ports on the Atlantic Coast of the United States. Up to the time of the stranding hereinafter referred to, the said steamship was tight, staunch, strong and seaworthy and in all respects properly manned and equipped.

Third. The respondent is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 21 State Street, Borough of Manhattan, City of New York, and at the time hereinafter referred to owned and/or operated the steamtugs "Dalzellite", "W. F. Dalzell" and "Fred. B. Dalzell, Jr."

[fol. 3] Fourth. The said steamtugs "Dalzellite", "W. F. Dalzell", and "Fred B. Dalzell, Jr.", are now or during the pendency of process herein will be within the jurisdiction of this Honorable Court.

Fifth. On information and belief the facts of the stranding are as follows:

On or about May 15, 1925, the respondent herein entered into an oral contract with the libelant to tow the SS. "Sabine Sun" from an anchorage off Stapleton, Staten Island, to the docks of the Texas Oil Company at Bergen Point, Bayonne, New Jersey. The weather was clear, the tide was flood and the wind was light from the south. The SS. "Sabine Sun" was laden with a cargo of fuel oil consigned to the Texas Oil Company and at the time in question had a maximum draught of twenty-four feet. In pursuance of the contract mentioned, respondent furnished the three tugs named to do the towing and also furnished a pilot who went aboard the bridge of the "Sabine Sun" and who was in complete and sole charge of the navigation, operation and maneuvering of the tow. Two of the tugs were stationed on either quarter and the third was forward on the port side.

At about 3:30 P. M., Daylight Saving Time, while the SS. "Sabine Sun", in tow of the said tugs and under the sole control of respondent's pilot, was making a turn from the

Kill von Kull into Newark Bay, she was negligently caused to strand on the bottom in shallow water outside the regular dredged ship channel. The SS. "Sabine Sun" lay aground for three hours and was finally freed only after a [fol. 4] portion of her cargo had been lightered. As a result of the stranding the shell plates in several of the lower strakes forward were fractured and distorted, some of the keel plates were buckled and considerable other damage was done to the under-water portion of the vessel.

Sixth. The aforesaid stranding was caused through no fault or negligence on the part of the SS. "Sabine Sun" or her owners or crew but was caused wholly and due solely to the fault and negligence of the respondent Dalzell Towing Company, Inc., and the tugs "Dalzellite", "W. F. Dalzell" and "Fred B. Balzell, Jr.", in the following particulars, among other-, which will be pointed out at the trial of this suit:

As to the Respondent, Dalzell Towing Company, Inc.

In that the Dalzell Towing Company, Inc. furnished a pilot by reason of whose negligence in not giving proper directions to the tugs "Dalzellite", "W. F. Dalzell" and "Fred B. Dalzell, Jr.", and in not keeping the SS. "Sabine Sun" under proper control, the stranding was due.

As to the Tugs "Dalzellite", "W. F. Dalzell", and "Fred B. Dalzell, Jr."

1. In that they were carelessly and negligently navigated.

2. In that they were not properly manned and equipped.

3. In that they failed to make due allowance for the tide.

[fol. 5] 4. In that they did not keep the "Sabine Sun" under proper control.

5. In that they failed to keep the "Sabine Sun" in the ship channel and permitted that vessel to strand in shallow water, a duly charted obstruction.

Seventh. By reason of the premises, the libellant has sustained damages in the sum of approximately Twenty-five Thousand ($25,000) Dollars, as nearly as can be estimated

at the present time, no part of which has been paid although payment has been demanded.

Eighth. All and singular the premises are true and within the Admiralty and maritime jurisdiction of this Honorable Court.

Wherefore libelant prays that process in due form of law according to the rules and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the said steamtugs "Dalzellite," "W. F. Dalzell" and "Fred. B. Dalzell, Jr.", their engines, boilers, etc., and that all persons interested therein may be cited to appear and make answer on oath to all and singular the matters aforementioned; and that citation in due form of law may issue against the respondent, Dalzell Towing Company, Inc., and that said company may be cited to appear and make answer on oath to the matters aforesaid; and that this Court will decree the payment by the said respondent to the libelant of the sum of Twenty-five thousand ($25,000) Dollars, together with interest and costs and that the said steamtugs "Dalzellite", "W. F. Dalzell" and "Fred. B. Dalzell, Jr." may be condemned and sold to pay the same and [fol. 6] that libelant may be given such other and further relief as may be just in the premises.

Duncan & Mount, Proctors for Libelant. Office & Post Office Address: 27 William Street, Borough of Manhattan, City of New York.

Duly sworn to by Frank Cross. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF RESPONDENT

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The amended answer of Dalzell Towing Company, Inc., to the libel of Sun Oil Company in a cause of stranding, civil and maritime, alleges:

First. Respondent denies any knowledge or information sufficient to form a belief as to the allegations of the first article of the libel.

Second. Respondent denies any knowledge or information sufficient to form a belief as to the allegations of the second article of the libel.

Third. Respondent admits that it is a corporation with an office at No. 21 State Street, Borough of Manhattan, City of New York, and denies the other allegations of the third article of the libel.

Fourth. Respondent admits the allegations of the fourth article of the libel.

Fifth. Respondent admits that on May 15, 1925, at the time of the stranding hereinafter mentioned the weather was clear, tide last of the flood, and wind light southerly; that respondent furnished three tugs to assist the "Sabine Sun"; that two of the tugs were stationed on either quarter, and a third was forward on the port side; that about 3:30 p. m. daylight saving time, the "Sabine Sun" stranded, and that she lay aground for about three hours and was finally freed after a portion of her cargo had been lightered. Respondent denies any knowledge or information sufficient to form a belief as to the cargo with which [fol. 8] the "Sabine Sun" was laden, and to whom that cargo was consigned, and as to the damage sustained as a result of the stranding. Respondent denies the other allegations of the fifth article of the libel.

Sixth. Respondent denies the allegations of the sixth article of the libel.

Seventh. Respondent admits demand and nonpayment, and denies the other allegations of the seventh article of the libel.

Eighth. Respondent admits the admiralty and maritime jurisdiction of this Court, and denies the other allegation of the eighth article of the libel.

Ninth. Further answering, respondent alleges the true facts are as follows:

On May 15, 1925, an order was received by respondent to furnish tugs to assist the "Sabine Sun" under her own steam from Stapleton, Staten Island, to the Texas Oil Company at Bayonne, New Jersey. The tugs "W. F. Dalzell" and the "Dalzellite" arrived alongside of the "Sabine

Sun" at Stapleton, and the master of the "W. F. Dalzell" went aboard the steamer to act as pilot as far as Port Richmond. The steamer got under way and proceeded under her own steam. The flotilla was joined by the tug "Fred B. Dalzell, Jr.", whose master went aboard the steamer and relieved the master of the "W. F. Dalzell" as pilot. Libellant's port superintendent was also on the bridge with the tug master and members of the ship's crew. The superintendent was advised by the master of the "Fred B. Dalzell, Jr.", that because of recent dredging operations [fol. 9] off Bergen Point the channel was not marked and there was no reliable chart of the vicinity; that there was danger of a vessel the size of the "Sabine Sun" stranding, and that the trip involved considerable risk. Libelant's superintendent thereupon agreed to assume the risk, relying upon the master of the "Fred B. Dalzell, Jr." using his best judgment under the circumstances. With this understanding the flotilla proceeded, and while every effort was being made to keep the vessel in the channel, during the turning into Newark Bay the steamer grounded off Bergen Point. As the channel was not marked respondent does not know whether or not the grounding occurred in the channel. A part of the vessel's cargo was lightered, and in about 3 hours she was afloat.

Tenth. Said stranding and consequent damage, if any, were not caused or contributed to by any negligence on the part of respondent, its agents or employees, but were due to inadequate channel markings, the fault and negligence of the libelant and/or to causes unknown to respondent.

Eleventh. Further answering respondent repeats and realleges the matters set forth in articles ninth and tenth of this amended answer, and further alleges that on December 28, 1923, in compliance with libelant's request it sent to libelant a copy of towage rates together with a notice of the conditions under which the towage services would be performed. Said notice provided in part as follows:

"When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed [fol. 10] that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the

tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

Subsequently, on or about May 15, 1925, libelant's marine superintendent (Turnbull) orally engaged the services of three tugs to assist the "Sabine Sun", by calling respondent's tug dispatcher. At the time of the stranding mentioned in articles ninth and tenth of this amended answer the "Sabine Sun" was making use of her own propelling power, and the captain of steamtug "Fred B. Dalzell, Jr." was on board. At the time of the stranding the tugs were assisting the steamer and the captain of the "Fred B. Dalzell, Jr.," was directing her navigation as servant of the libelant subject to the terms of the aforesaid notice, and by virtue thereof the respondent is not liable for the damage, if any, sustained by the "Sabine Sun".

All and singular the premises are true.

Wherefore respondent prays that the libel herein as against it may be dismissed with costs.

Burlingham, Veeder, Masten & Fearey, Proctors for Respondent.

Duly sworn to by Fred B. Dalzell. Jurat omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

AMENDED ANSWER OF CLAIMANT

To the Honorable the Judges of the United States District Court for the Southern District of New York.

The amended answer of Fred B. Dalzell, managing owner and claimant of steamtugs "Dalzellite," "W. F. Dalzell," and "Fred B. Dalzell Jr.," as proceeded against upon the libel of Sun Oil Company in a cause of stranding, civil and maritime, alleges:

First. Claimant denies any knowledge or information sufficient to form a belief as to the allegations of the first article of the libel.

Second. Claimant denies any knowledge or information sufficient to form a belief as to the allegations of the second article of the libel.

[fol. 12] Third. Claimant admits respondent is a corporation with an office at No. 21 State Street, Borough of Manhattan, City of New York and denies the other allegations of the third article of the libel.

Fourth. Claimant admits the allegations of the fourth article of the libel.

Fifth. Claimant admits that on May 15, 1925, at the time of the stranding hereinafter mentioned the weather was clear, tide last of the flood, and wind light southerly; that respondent furnished three tugs to assist the "Sabine Sun"; that two of the tugs were stationed on either quarter, and a third was forward on the port side; that about 3:30 p. m. daylight saving time, the "Sabine Sun" stranded, and that she lay aground for about three hours and was finally freed after a portion of her cargo had been lightered. Claimant denies any knowledge or information sufficient to form a belief as to the cargo with which the "Sabine Sun" was laden, and to whom that cargo was consigned, and as to the damage sustained as a result of the stranding. Claimant denies the other allegations of the fifth article of the libel.

Sixth. Claimant denies the allegations of the sixth article of the libel.

Seventh. Claimant admits demand and non-payment, and denies the other allegations of the seventh article of the libel.

Eighth. Claimant admits the admiralty and maritime jurisdiction of this Court, and denies the other allegation of the eighth article of the libel.

Ninth. Further answering, claimant alleges the true facts are as follows:

[fol. 13] On May 15, 1925, three tugs were ordered to assist the "Sabine Sun" under her own steam from Stapleton, Staten Island, to the Texas Oil Company at Bayonne, New Jersey. The tugs "W. F. Dalzell" and the "Dalzellite" arrived alongside of the "Sabine Sun" at Stapleton,

and the master of the "W. F. Dalzell" went aboard the steamer to act as pilot as far as Port Richmond. The steamer got under way and proceeded under her own steam. The flotilla was joined by the tug "Fred B. Dalzell, Jr.," whose master went aboard the steamer and relieved the master of the "W. F. Dalzell" as pilot. Libelant's port superintendent was also on the bridge with the tug master and members of the ship's crew. The superintendent was advised by the master of the "Fred B. Dalzell, Jr.," that because of recent dredging operations off Bergen Point the channel was not marked and there was no reliable chart of the vicinity; that there was danger of a vessel the size of the "Sabine Sun" stranding, and that the trip involved considerable risk. Libelant's superintendent thereupon agreed to assume the risk, relying upon the master of the "Fred B. Dalzell, Jr.," using his best judgment under the circumstances. With this understanding the flotilla proceeded, and while every effort was being made to keep the vessel in the channel, during the turning into Newark Bay the steamer grounded off Bergen Point. As the channel was not marked claimant does not know whether or not the grounding occurred in the channel. A part of the vessel's cargo was lightered, and in about 3 hours she was afloat.

Tenth. Said stranding and consequent damages, if any, were not caused or contributed to by any negligence on the [fol. 14] part of the tugs, "Dalzellite," "W. F. Dalzell" and "Fred B. Dalzell, Jr.," or those in charge of them, but were due to inadequate channel markings, the fault and negligence of the libelant and/or to causes unknown to respondent.

Eleventh. Further answering claimant repeats and realleges the matters set forth in articles ninth and tenth of this answer and further alleges that on December 28, 1923, in compliance with libelant's request, claimant had sent to libelant a copy of towage rates together with a notice of the conditions under which the towage services would be performed. Said notice provided in part as follows:

"When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners

in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

Subsequently, on or about May 15, 1925, libelant's marine superintendent (Turnbull) orally engaged the services of three tugs to assist the "Sabine Sun," by calling the tug despatcher of claimant's agent. At the time of the stranding mentioned in articles ninth and tenth of this answer the "Sabine Sun" was making use of her own propelling power, and the captain of steamtug "Fred B. Dalzell, Jr.," was on board. At the time of the stranding the tugs were assisting [fol. 15] the steamer and the captain of the "Fred B. Dalzell, Jr.," was directing her navigation as servant of the libelant subject to the terms of the aforesaid notice, and by virtue thereof the tugs "Dalzellite," "W. F. Dalzell" and "Fred B. Dalzell, Jr.," are not liable for the damage, if any, sustained by the "Sabine Sun."

All and singular the premises are true.

Wherefore claimant prays that the libel herein as against the "Dalzellite," "W. F. Dalzell" and "Fred B. Dalzell, Jr.," may be dismissed with costs.

Burlingham, Veeder, Masten & Fearey, Proctors for Claimant.

Duly sworn to by Fred B. Dalzell. Jurat omitted in printing.

[fol. 16] In United States District Court, Southern District of New York

Sun Oil Company, Libelant,

against

Dalzell Towing Company, Inc., and Against the Steamtugs "Dalzellite", "W. F. Dalzell" and "Fred B. Dalzell, Jr.", Their Engines, Boilers, etc.

Order Substituting Proctors for Respondent

Upon the subjoined consent and on motion of Burlingham, Veeder, Fearey, Clark & Hupper, it is

Ordered that Burlingham, Veeder, Fearey, Clark & Hupper be, and they hereby are, substituted in the place and stead of Burlingham, Veeder, Masten & Fearey, as proctors for the Dalzell Towing Company, Inc.

Dated New York, N. Y., Dec. 27, 1929.

Alexander Gilchrist, Jr., Clerk.

We hereby consent to the entry of the foregoing order.
Burlingham, Veeder, Masten & Fearey, Proctors for
Dalzell Towing Company, Inc.

[fol. 17] In United States District Court

[Title omitted]

Before Hon. John C. Knox, U. S. D. J.

Statement of Evidence

New York, February 10, 1930.

Appearances

Duncan & Mount for the Libelant, by Frank A. Bull, Esq.
Burlingham, Veeder, Fearey, Clark & Hupper for Claimant and Respondent, by Chauncey I. Clark, Esq., and P. F. Shortridge, Esq.

Offers in Evidence

Mr. Clark: May I offer the correspondence?

[fol. 18] The Court: Yes.

Mr. Clark: I will start with a letter of April 24, 1923. This was the original letter with this clause, April 24, 1923, sending out the schedule of rates and the contract.

Mr. Bull: I cannot agree to that. Anything you sent to the Sun Oil Company that is a carbon copy I will agree to.

Mr. Clark: We had a list and when you went over it with Mr. Shortridge he showed it to you. This is the beginning, April 24, 1923. It is a letter that we got up at the time in my office, and it was sent out to all the people Dal-

zell did business with, and that list they have. That is number one.

The next was November 15, 1923, correspondence with the Sun Oil Company, Mr. Charles R. Inness, our letter of November 13, 1923, and your reply of November 14, 1923.

Mr. Bull: It apparently was sent, I will admit that, though I have never been able to find my copies.

Mr. Clark: I offer in evidence Sun Oil Company letter of November 14, 1923.

Received and marked Respondent's Exhibit A.

Mr. Clark: I offer in evidence copy of Dalzell Towing Company's letter to the Sun Oil Company, attention of Mr. Inness, in answer to Exhibit A.

Received and marked Respondent's Exhibit B.

[fol. 19] Mr. Clark: I offer in evidence copy of the towage rates and contract which was attached to and enclosed with the letter referred to in the last paragraph, page 1, of the letter, Exhibit B.

Received and marked Respondent's Exhibit C.

Mr. Clark: I offer in evidence copy of bill of Dalzell to the Sun Oil Company referred to in Exhibit B and enclosed therewith.

Received and marked Respondent's Exhibit D.

Mr. Clark: I offer in evidence letter from Sun Oil Company to Dalzell, dated December 27, 1923.

Received and marked Respondent's Exhibit E.

Mr. Clark: I offer in evidence copy of letter from Dalzell to Sun Oil Company, attention of Mr. Newland Carr, dated December 28, 1923, in answer to Exhibit E.

Received and marked Respondent's Exhibit F.

Mr. Clark: I also call attention and wish it to appear in the record of this case, that in the last exhibit (Exhibit F), Dalzell letter to Sun Oil Company, also a copy of the tariff rates contract was enclosed, which is already marked, Exhibit C. I offer in evidence letter from Sun Oil Company to

[fol. 20] Dalzell, June 6, 1924, signed by L. A. Turnbull, Sun Oil Company.

Received and marked Respondent's Exhibit G.

Mr. Clark: I offer in evidence copy of bill to Sun Oil Company, May 29, 1924, which is the bill referred to in the letter marked Exhibit G. If there is any mistake about this, I am willing to have it checked, but I think that I am right about it.

Received and marked Respondent's Exhibit H.

Mr. Clark: I offer in evidence copy of letter from Dalzell to Sun Oil Company, dated June 10, 1924, attention of Mr. Turnbull, in answer to Mr. Turnbull's letter, marked Exhibit F.

Received and marked Respondent's Exhibit I.

Mr. Clark: I also wish it to appear in the record at this point that with this last exhibit, Dalzell's letter marked Exhibit I, was sent again another copy of the towage rates and contract marked Exhibit C. I call attention to the fact that in the upper right-hand corner of the last exhibit, Exhibit I, is marked, "Page 628, 1924", and if there is any question about whether that is so, I think it can be straightened out later, but I think that that is correct. I offer this in evidence.

[fol. 21] Received and marked Respondent's Exhibit J.

Mr. Clark: I think I can satisfy Mr. Bull later about the first letter, April 24, 1923, although it is hardly important. If I can, I will put that in also.

Mr. Bull: It is perfectly all right to leave it open until you can satisfy me.

Counsel state their claims.

Leopold A. Turnbull, a witness called on behalf of the libelant, being duly sworn, testified as follows:

Direct examination.

By Mr. Bull:

Q. With whom were you engaged or employed in May, 1925?

A. The Sun Oil Company.
Q. Where is the Sun Oil Company?
A. Philadelphia.
Q. Is it a partnership, a corporation, or what?
A. It is a corporation.
Q. Where?
A. It is a New Jersey Corporation, but the main office is in Philadelphia.
Q. In what capacity were you working at the time?
A. As assistant marine superintendent.
Q. Where were you stationed?
A. Marcus Hook. That is the marine office.
Q. Did the Sun Oil Company own the Sabine Sun?
A. Yes, sir.
[fol. 22] Q. Do you recall her trip up to the Texas Company dock on May 15, 1925?
A. Yes, sir.
Q. Did you have anything to do with that?
A. Yes, sir.
Q. Will you please tell us what?
A. I had charge of handling the ship to discharge her cargo and to see that the captain had his papers changed, and the stores all ordered, ready for her succeeding voyage.
Q. What do you mean by handling the ship?
A. To order the tugs to take her to the dock.
Q. Did you have anything to do with her navigation?
A. No, sir.
Q. Did you make arrangements for tugs to take her up?
A. Yes, sir.
Q. Where was she at that time?
A. She was on her way to Stapleton; she was not in yet.
Q. When was that?
A. That was on the afternoon of the fourteenth.
Q. How did you make this arrangement?
A. By telephone.
Q. Whom did you telephone to?
A. Dalzell's office. I think either Mr. Sullivan or Mr. Brady.
Q. What did you tell them?
A. That the ship would be there on the following day, and that we were going to lighter the ship to twenty-four feet,

and asked them to take the ship up to the dock and dock her at the Texas Oil Company dock at Bergen Point.

Q. What did they say?

A. They said that they would.

Q. Did they say anything about when they would, or how they would?

A. They told me that they would be ready to take her up about, if I remember rightly, about one-thirty.

[fol. 23] Q. On what day?

A. On the fifteenth.

Q. Did you tell them how many tugs you wanted ?

A. No, sir.

Q. Did they send any tugs?

A. They sent one down to Stapleton when she was at anchor and she proceeded up the channel and another tug met her.

Q. Do you know where that other tug met her?

A. Just off St. George somewhere, I think.

Q. And when the first tug came along, what was the first thing it did?

A. Tied up alongside.

Q. And then what happened?

A. The captain of the towboat came aboard.

Q. Where did he come on board?

A. He came up on the bridge.

Q. Where were you at the time?

A. In the captain's room.

Q. Was anybody else in there?

A. No, sir. The captain was with me.

Q. You and the captain were together?

A. The captain and I were together.

Q. That was when he came on board?

A. Yes, sir.

Q. Did you go out when he got on board?

A. We were notified.

Q. And what did you do then?

A. We went up on the bridge.

Q. Did you see the captain there?

A. Yes, sir.

Q. What was he doing?

A. Giving orders to the mate to lift the anchor.

Q. Before this tug captain came on board, did you ask him to come aboard?

A. No, sir.

Q. Do you know whether the captain did or not?

A. We were in the captain's room when he came aboard.

Q. Then did the captain?

A. No, sir.

[fol. 24] Q. Then what did you and the captain do when you came out and found him giving orders?

A. I stayed on the bridge.

Q. And then you proceeded down until the next tug came alongside?

A. Yes, sir.

Q. Did that tug captain come aboard?

A. No, sir.

Q. What happened after that?

A. Proceeded up the channel to the Kills, where a third tugboat met us, and that captain came aboard.

Q. Who asked him to come aboard, do you know?

A. I don't know.

Q. Did you ask him to?

A. No, sir.

Q. Do you know whether or not the captain asked him to?

A. He did not.

Q. Were you with the captain at the time?

A. Yes, sir.

Q. When he came aboard, what did he do?

A. He took charge of the pilotage.

Q. What happened to the other man that was there?

A. He stayed on board.

Q. The other captain who had been piloting stayed with the new one?

A. Yes, sir.

Q. And the new one took charge of the operations from then on?

A. Yes, sir.

Q. After that, what happened?

A. We proceeded down through the Kill, the new captain giving all orders to the tow boats and the engines.

Q. Just what happened, if anything?

A. Struck bottom somewhere.

Q. Do you remember when you did that?

A. I don't know that I remember the exact time. A little after three sometime I think it was, daylight saving time.

[fol. 25] Q. You would say half past three, quarter past three, or what, about?

A. Well, nearer half past three than three.

Q. What did you do when you struck?

A. I went off the bridge to see what damage was done.

Q. Did you look for damage?

A. I did. I looked and could not find any because the tank was full of water.

Q. What tank?

A. The Number 1, starboard side.

Q. Do you mean that it was full of water before you struck?

A. No, sir.

Q. You mean she was full when you went down and looked at it?

A. It was full when I went down and looked at it.

Q. Do you know the condition of that tank before you struck there?

A. It was empty.

Q. Where had it been emptied?

A. Down at Stapleton, where we had been lightering.

Q. Was there any other damage from that grounding?

A. Yes, in the fore deep tank, and the cofferdam and the number two tank.

Q. Was there any water leaked into number one port?

A. Not at that time, if I remember.

Q. What did you do then?

A. I went and talked to the captain and went ashore with one of the tugs, to get some lighters.

Q. And then where did you go?

A. To the Texas Oil Company dock.

Q. Did you get lighters?

A. Yes, sir.

Q. And brought them back to the ship?

A. Yes, sir.

Q. What did you do with them?

A. Connected them up and lightered the cargo from the forward tanks.

[fol. 26] Q. Was any of the cargo taken out of the forward tanks except what you lightered?

A. The cargo drifted back into the number nine tank.

Q. It ran back by gravity?

A. Yes, sir.

Q. How would it run back by gravity to number nine? Wasn't there oil in there?

A. Yes, but that had been lightered at Stapleton and was below the level of the number two tank.

Q. After that was done, after you got some of it run back to the after tanks, and you lightered some of the forward tanks, were they able to pull her off the rocks?

A. She came off the rocks, yes, sir.

Q. And started off again?

A. And started off again.

Q. And went up to the Texas Company dock?

A. And went up to the Texas Company dock.

Q. You spoke of lightering down at Stapleton?

A. Yes, sir.

Q. Why did you lighter?

A. Because we were advised to by the Texas Oil Company.

Q. What did they tell you?

A. To lighter the ship to twenty-four feet.

Q. Did you see what her draft was before you left Stapleton?

A. Yes, sir.

Q. What was it?

A. Approximately twenty-four feet.

Q. Was it anything over twenty-four feet?

A. It was a little under, if anything.

Q. That would be twenty-three something?

A. Yes, sir.

Q. Now, at the time you called up the Dalzell Company and asked for tugs to get you up and dock you at the Texas Company dock, did you know about any pilotage clause that the Dalzell Company had?

A. No, sir.

[fol. 27] Q. I showed you what has been offered here as Exhibit C for the respondent, which is entitled, "Pro forma towage rates and contract". It has a lot to do with rates, and I note that down on the second sheet, at the very bot-

tom, there is a clause entitled, "Pilotage". Will you tell me whether or not, at the time you engaged these tugs, you knew that they had a clause like that?

A. No, sir.

Q. This second tug captain that came aboard, did you ask him to come aboard?

A. No, sir.

Q. Did the captain?

A. No, sir.

Q. Did you ask him to take over the charge of the ship in place of the other pilot?

A. No, sir.

Q. Nor did the captain?

A. No, sir.

Q. Who was directing the navigation at the time that you struck bottom?

A. The second captain that came aboard.

Cross-examination.

By Mr. Clark:

Q. Mr. Turnbull, you are familiar with these invoices of Dalzell's?

A. Yes, sir.

Q. I show you an invoice which was the subject of some correspondence between you and Dalzell. I think you will find that that invoice is the subject of that correspondence, referring to your letter of November 26, 1924, marked Exhibit G. Do you remember that?

A. Yes, sir.

Q. You see those invoices right along, don't you?

A. Yes, sir.

Q. Here is another one that was the subject of correspondence. This has been marked in evidence, Exhibit D.

A. Yes, sir.

Q. Do you see those right along?

A. At this time I used to see only specials that came in, where there was any question. I never used to see these at all.

[fol. 28] Q. You had charge of the special cases that were taken up?

A. Only when there was any question on the rates.

Q. And in order to write the letter to which you refer, you had to have this before you, did you not?

A. No, sir.

Q. Why not?

A. Because I have never seen one of these.

Q. You have never seen one of those?

A. Not to my knowledge.

Q. You wrote that letter which you hold in your hand, did you not?

A. Yes, sir.

Q. And you received a reply to it?

A. Yes, sir.

Q. That is the reply, dated June 10, 1924?

A. Yes, sir.

Q. There was a towage schedule and contract enclosed with it?

A. That may not have been in the letter when I received it, because the mail is opened in our mailing department, upstairs.

Q. So that you think probably the mail was opened somewhere else, and they did not give you everything that was in the mail; is that it?

A. Possibly.

Q. Just look at the bottom of this invoice there to which you refer in your letter, where you are quarrelling with the invoice. You had that notice before you at the time you wrote the letter. Do you see the clause at the bottom of the invoice?

A. Yes, sir.

Q. What does that say?

A. I have read it.

Q. You have read it?

A. I have read it now, yes, sir. But I never remember reading it before.

Q. This is the first time you have ever heard of it, is it not?

A. I heard of it, but it is the first time I have ever seen it to read it.

Q. But you have written letters to Dalzell taking up with them certain rates?

A. Yes, sir.

[fol. 29] Q. And you had the invoice with you when you wrote the letter?

A. Only one to my knowledge.

Q. And you had the invoice before you at the time?

A. Yes, sir.

Q. And you did not read the invoice?

A. Not the printed matter that was at the bottom.

Q. Who is Mr. Inness?

A. He is a clerk in our marine department in Philadelphia.

Q. And who is Mr. Carr?

A. He is the manager of the office down at Marcus Hook.

Q. He is in charge of Marcus Hook?

A. No, he only has charge of the clerks, of the mail.

Q. He is office manager?

A. That is his title, yes, sir.

Q. Are you sure that you have never seen a document like that before? I refer to Exhibit C.

A. To the best of my knowledge I never saw a copy of that document.

Q. You have never seen one like it?

A. No, not to my knowledge.

Q. How did you familiarize yourself with these rates?

A. I never familiarized myself with the rates.

Q. You did not?

A. No, sir.

Q. Didn't you know anything about what those rates were?

A. I know the Towing Company's rates.

Q. They change from time to time, do they not?

A. I only know what they tell me on the telephone what the rates are.

Q. And that is the only way you ever knew anything about the rates?

A. That is right.

Q. When you wrote that letter of June 6, 1924, to Dalzell, Exhibit G, you had to know something about the rates?

A. That was a question of time.

[fol. 30] Q. And you did not have to know about the rates?

A. No, sir.

Q. When you received this letter from Dalzell,—your letter of June 6, Dalzell's letter June 10,—you read the letter, did you not?

A. I suppose I did. I don't remember it. That was 1924.

Q. In reading the letter, referring to the second paragraph, you will see that in order to explain the charge, they thought it advisable for your information to enclose another letter of their towing schedule rates and contract. Do you notice that?

A. I noticed that, yes, sir.

Q. And did you at that time notice it?

A. I cannot remember that.

Q. So that you do not remember now whether you had the contract then or not?

A. No, sir.

Q. You don't remember?

A. I don't remember.

Q. You may have had it and can't remember now?

A. No, sir.

Q. Your answer, "No, sir", means that you cannot remember whether you had the contract before you at that time; is that right?

A. That is right.

Q. Do you want us to believe that you had never seen what is usually termed the pilotage clause which is at the bottom of the invoice?

A. I would not say that I had never seen it, but I will say that I never read it.

Q. Before you told me that you had never seen it, but that you had heard of it. Now, just what do you mean when you say now that you would not say you had not seen it, but that you had not read it? Do you mean that having seen this pilotage clause, and being an assistant superin- [fol. 31] tendent of the Sun Company, that not seeing it was better than not reading it, and you avoided reading it?

A. No, sir.

Q. What do you mean? You said you had heard of it, and I think you said you had not seen it. Now you say you may have seen it but did not read it. When did you see it and not read it?

A. When I O. K.'d that bill, when that letter was written.

Q. You think that perhaps you did see it at that time?

A. Yes, sir.

Q. Was it not part of your job to know what was going on as assistant marine superintendent, knowing what the rates were, and the conditions of the towage rates? Wasn't that part of your job?

A. Yes, sir, but any contracts that were made would not be made through me.

Q. Who would they be made through?

A. Through our Philadelphia office, or our manager, Mr. Duke, who was the manager of the department at that time.

Q. When you were assistant marine superintendent and had received correspondence, and had this correspondence with reference to rates, when the contract had this clause on, did you consider taking it up with anybody else?

A. No, sir.

Q. Why not?

A. Because that was not my duty.

Q. What were your duties as assistant marine superintendent?

A. To look after the ships and repairs and see that they were facilitated in the operation, and went to sea again.

Q. And to arrange for tugs?

A. To arrange for tugs, yes, sir. Away from the home port.

Q. New York is a port away from home?

A. Yes, sir.

[fol. 32] Q. And your duties include arranging for those things in New York?

A. Yes, sir.

Q. And when something came up and you did not think it right, with reference to the bills of the tugboat companies, your duty was to take up those expenses?

A. Yes, sir.

Q. And you did that?

A. Yes, sir, in this particular case.

Q. And you did it on other occasions?

A. Not that I can remember.

Q. You only remember doing it on one occasion?

A. Yes, sir.

Q. Inasmuch as it was your duty to arrange for tugs away from home, and New York was away from home, and you were to arrange for tugs there, was it not your duty

to see what the arrangements with the tugboat company were?

A. I don't understand your meaning.

Q. Was it not your duty to see and understand and know what the arrangements were with the tugboat companies away from home?

A. Yes, sir.

Q. Then why did you not examine the notices that had the clause on, the pilotage clause on?

A. Because that was not part of my duty.

Q. But you said it was your duty to make arrangements for the tugs?

A. Yes, sir, to make arrangements for the tugs, not to look up pilotage clauses.

Q. When you saw a clause with reference to the arrangements with the tugboat company, why was it not your duty to know what that clause was?

Mr. Bull: I object. A man is not going to look for something he does not know about. It was their place to tell [fol. 33] him if they wanted anything like that.

The Court: That is a matter of argument.

Q. Did you appreciate, Mr. Turnbull, what this maneuver was going to be on the Sabine Sun on this particular day?

A. No, sir.

Q. You did not know where she was going?

A. Yes, sir, I knew where she was going.

Q. Then you knew what the maneuver was going to be?

A. I am not familiar with the general maneuvering in the channel.

Q. You knew where she was going?

A. Yes, sir.

Q. And you knew where she was?

A. Yes, sir.

Q. You had been to New York before and boarded Sun Oil Company steamers and proceeded with the steamers to their destination?

A. Yes, sir.

Q. Then you knew what the maneuver was going to be, did you not?

A. Yes, sir.

Q. And that is what you came to New York for, was it not?

A. Yes, sir.

Q. About how many times before or since have you been on steamers in New York and proceeded with the vessel from anchorage ground or some other place to destination?

A. That is very hard to answer.

Q. Well, about?

A. Probably half a dozen times.

Q. Were they always under their own steam as this vessel was?

A. Yes, sir.

Q. Always under their own steam?

A. Yes, sir.

Q. And did always a tugboat captain act as pilot and take charge?

A. Yes, sir.

Q. Always?

A. Always.

[fol. 34] Q. You knew this was going to occur on this occasion?

A. Yes, sir.

Q. It was not necessary for you to request one of the tugboat captains to act as pilot, was it?

A. No, sir.

Q. You expected that?

A. Yes, sir.

Q. That was your arrangement with Dalzell?

A. I did not make any arrangements.

Q. Those were the arrangements, and the way it had been going on before and since?

A. Previous to my being with the company it was done that way.

Q. A tugboat captain would come on a boat with her own steam and give the orders to the engines and to the helm?

A. Yes, sir.

Q. This particular maneuver was made in the same manner as other maneuvers had been made?

A. Yes, sir.

Q. As far as other tugboat captains coming on board and taking charge was concerned?

A. Yes, sir.

Q. Do you remember who these captains were that came on board?

A. I don't remember the names. I remember one name that I had met before. The first one that came aboard was off one of the Dalzell tugs.

Q. How did you get on board?

A. I went on a launch.

Q. You were on board when the first tug arrived?

A. Yes, sir.

Q. Where were you when the second tugboat captain came on?

A. I was on the bridge.

Q. Who else was on the bridge?

A. The captain of the ship.

Q. Who else?

A. The third mate.

Q. Who else?

A. The quartermaster.

[fol. 35] Q. Do you remember their names?

A. I remember Captain Larson; I don't remember the third mate's name or the quartermaster's.

Q. Had you had any other steamers go to this same place, the Texas Oil Company?

A. Not to my knowledge.

Q. Had you ever met Captain Fort before?

A. Yes, sir.

Q. You knew him?

A. Yes, sir.

Q. And you had been on the bridge on other occasions, or at least one other occasion, when Captain Fort was in charge?

A. Yes, sir.

Q. I believe you testified on direct that when Captain Fort, the second tugboat captain, came on the bridge that Captain Bennett remained on the bridge?

A. Yes, sir.

Q. You remember that?

A. Yes, sir.

Q. When Captain Fort came on the bridge he had a conversation with you?

A. Not to my knowledge.

Q. You do not remember any conversation with Captain Fort?

A. Only just passing the time of day, personal greetings.

Q. No conversation at all?

A. No, sir.

Q. Could you remember what the passing of the time of day was, the exact words?

A. No, sir, I can't remember that; only "How do you do?"

Q. You do not seem to remember very much about what went on when you got on the bridge?

A. No, sir, not at that time.

Q. Captain Fort is here in court, and he is going to testify to a conversation with you. You do not remember anything about it?

A. No, sir.

Q. Do you deny that you had a conversation with him?

[fol. 36] Mr. Bull: I object unless he wants to make him his own witness.

The Court: He may ask him whether he denies having had a conversation about some particular matter.

A. I won't deny any specific conversation. He may have said something to me, but to make any reply I don't remember, being it is since 1925.

Q. Then you will leave it that you do not remember?

The Court: You had better direct his attention to what Captain Fort is going to testify to, because if it was an important conversation it is hardly probable that a person would forget it.

Mr. Bull: When he testifies to it I want to make an objection. And I object to my witness being examined on it first.

Mr. Clark: There is no surprise?

Mr. Bull: No.

The Court: You may ask him.

The Court:

Q. Do you recall any conversation with Captain Fort having to do with the character of the channel and the dangers in an attempt to take this boat up to Newark?

The Witness: No, sir.

The Court: Would you remember a conversation of that kind if it took place?

The Witness: Yes, sir.

The Court: Would you deny that such a conversation or statement upon the part of Captain Fort did take place upon this occasion?

The Witness: Yes, sir.

[fol. 37] Q. Did you have any conversations with Captain Fort at all on this day?

A. Only after the damage, possibly talking about it.

Q. What was the conversation then?

A. I cannot remember.

Q. Don't you remember saying something after the vessel stopped, after she struck something, don't you remember saying something?

A. No, sir.

Q. What was the first thing that you did after she brought up?

A. I went down on the deck to see if I could see what the damage was.

Q. And you ascertained what her condition was, as you testified to on direct?

A. Yes, sir.

Q. What was the next thing?

A. I spoke to our own captain, and told him I had better get some lighters to lighter the ship.

Q. And that was done?

A. And that was done, yes, sir.

Q. Do you yourself know anything about where the boat brought up, I mean, where, with reference to different landmarks in the vicinity?

A. Somewhere around Bergen Point Light.

Q. You are not a navigator?

A. No, sir.

Q. You could not place her yourself?

A. No, sir.

Q. Later, Mr. Turnbull, did someone else come on board?

A. I believe they did, but I did not see anybody.

Q. You did not see anyone else come on board?

A. No, sir.

Q. How long did you remain?

A. I went over to get the barges and I was occupied getting the cargo.

Q. How long did you remain on board?

A. Until she went to the dock.

[fol. 38] Q. That was some time, was it not?
A. Yes, sir.
Q. Several hours?
A. Yes, sir; probably three hours.
Q. And you do not remember anyone else coming on board?
A. There may have been; I can't say, no, sir.

Redirect examination.

By Mr. Bull:

Q. When you called up and asked for these tugs, whoever you talked to of the Dalzell Company—did he tell you anything about the pilotage?
A. No, sir.
Q. Any pilotage clause of theirs?
A. No, sir.
Q. Or anything they would call a contract?
A. No, sir.
Q. You said that in view of the fact that you had engaged tugs to take vessels for the Sun Oil Company, you knew how she was going to maneuver?
A. Yes, sir.
Q. You are not a navigator?
A. No, sir.
Q. What did you mean by that?
A. I knew how she was going to start up the channel.
Q. You did not know just when she should go this way or that way, astern, forward, or so on, did you?
A. No, sir.
Q. All you knew was that she was going down to the Passaic River and turn out into Newark Bay, is that it?
A. That is all.

By Mr. Clark:

Q. You knew that one of the tugboat captains was going on board the vessel to take charge, didn't you?
A. He was there; yes, sir.
Q. And you expected that?
A. Yes, sir.

[fol. 39] By Mr. Bull:

Q. Why did you expect that?
A. Because that had previously been done in other cases.
Q. Without asking for one?
A. Yes, sir.
Q. When you said awhile ago that you were on the ship while she was stranded down there for a number of hours until she went up to the dock, you did not mean that you were on her all that time, do you?
A. I was over getting the barges.
Q. And then you came on?
A. Yes, sir.
Q. And then you were on her until you went to the dock?
A. Yes, sir.

The Court: Just what were you doing on the Sabine Sun this day?

The Witness: To arrange with the captain for her stores and equipment, to see that the captain had his papers, and so forth.

Mr. Bull: I offer in evidence letter of February 4, 1929, of libelant's counsel to claimant-respondent's counsel.

Received and marked Libelant's Exhibit 1.

Mr. Bull: I offer in evidence reply dated May 20, 1929.

Received and marked Libelant's Exhibit 2.

Mr. Bull: I also offer in evidence letter of June 28, 1929, from libelant's counsel to claimant-respondent's counsel.

Received and marked Libelant's Exhibit 3.

Mr. Bull: I offer in evidence reply dated July 3, 1929.

[fol. 40] Received and marked Libelant's Exhibit 4.

Libelant's case closed.

HOWARD P. FORT, a witness called on behalf of the claimant-respondent, being duly sworn, testified as follows:

Direct examination.

By Mr. Clark:

Q. What is your business?
A. Master of steam vessels.
Q. What license do you hold?
A. Unlimited tonnage.
Q. What waters?
A. Harbor of New York and tributaries.
Q. Does your business include going up to the Texas Oil Company plant where the Sabine Sun was bound on the day of this accident?
A. It does.
Q. How long have you been following the water?
A. About twenty years.
Q. How long have you held a master's license?
A. Fifteen years.
Q. Just what is your special work as master? What are you engaged in?
A. Ever since I have held a master's license I have been docking steamers.
Q. Around the harbor?
A. Around the harbor.
Q. The same kind of work you were engaged in on the day of this accident?
A. Yes, sir.
Q. Do you remember this Sabine Sun stranding, captain?
A. I do.
Q. On May 15, 1925?
A. Yes.
Q. Where was she bound from, and where to?
[fol. 41] A. Off Staten Island anchorage to the Texas Oil Company.
Q. And she was loaded, or light?
A. Loaded.
Q. And was she under steam or not?
A. She had her own power.
Q. You were master of what tug at that time?
A. Fred B. Dalzell, Jr.

Q. And you met the Sabine Sun, where?
A. I met the Sabine Sun off Port Richmond.
Q. And did you board her?
A. I did.
Q. Did you go on her bridge?
A. I did.
Q. And you relieved whom?
A. Captain Bennett of the tug W. F. Dalzell.
Q. He had been in charge as pilot up to that point?
A. He had been in charge as pilot up to that point.
Q. And when you went on the steamer's bridge and took charge and acted as pilot, who was on the bridge?
A. Captain Turnbull, the third officer of the tug, the quartermaster, Captain Bennett and myself.
Q. How was the weather?
A. Fair; clear.
Q. Any wind to speak of?
A. I don't think there was.
Q. How was the tide?
A. Flood tide.
Q. Full?
A. No, it was about an hour before high water.
Q. Is that the proper time to go up there?
A. It is.
Q. Is that the best time to go up there?
A. Yes.
Q. How long have you been piloting steamers in and out of this particular place? I now refer to the vicinity of where the Sabine Sun was bound on this day?
A. Eight or nine years.
[fol. 42] Q. You have been piloting steamers in and out of there ever since?
A. Yes, sir.
Q. Have you any idea how many steamers you have piloted around the vicinity of where this boat brought up on an obstruction?
A. I have taken so many up there that it would be hard to name the number.
Q. Could you estimate it by saying how many a year, and then say how many years?
A. I average four or five a month. One a week, anyway.
Q. And that is for how many years?
A. For the last seven or eight years.

Q. What were the conditions around the place where this boat struck, at that particular time? I mean, general conditions. I have reference to operations with reference to the channel.

A. It always has been a very difficult channel to navigate from Port Richmond up to the light, or if you go down the Sound to Shooters Island. It is narrow, rocky on both sides and treacherous tides. They were dredging and mud digging, and there were drills in the way, and tows to meet, and a very narrow space to navigate the vessel.

Q. How about the channel markings, buoys, and so forth?

A. You had very few channel markings there, some of the channels were not marked at all.

Q. And how about charts showing the conditions?

A. There was no reliable chart of that district from Port Richmond up, because the engineers would give us a chart, but they would not vouch for it, they would say that that was the best they could do.

Q. When did you know, or when were you informed, that you were going to have the job of piloting this steamer on [fol. 43] this particular day?

A. The day before, I believe.

Q. And were you told anything about what she had or what she was going to draw?

A. They told me she was drawing twenty-five feet six inches.

Q. Did you do anything about the job ahead of time?

A. Yes, I went up there and took soundings, the best I could do with a lead line; of course, you cannot do the best with lead lines.

Q. She expected she was going to draw twenty-five feet six inches?

A. Yes.

Q. You heard Mr. Turnbull say they loaded her to twenty-four feet?

A. When I took her, she was drawing twenty-five feet six inches aft.

Q. Aft?

A. Aft.

Q. How do you know that?

A. I took that from the officers' book on the bridge. I asked for the draft and they told me twenty-five feet six inches, and that is what my office told me to expect.

Q. What method have you of making the turn in the vicinity,—you turn starboard and go up toward the Texas Oil Company? Are there any ranges at all?

A. That is the only thing we can go by.

Q. What is that?

A. A big gas tank over the street, and as soon as you open that up, you start to turn your ship to go up Newark Bay and keep that in line and head up for the west end of the bay.

Q. As you started on this occasion, from the time you took charge, what tugs were there?

A. The W. F. Dalzell, the Dalzellite and the Fred B. Dalzell, Jr.

[fol. 44] Q. Where were those tugs placed?

A. The W. F. on the port bow, the Jr. on the port stern, and the Dalzellite on the starboard bow.

Q. What did you expect to use that for?

A. To help me break her sheer in case she got a sheer in a bad place.

Q. And you were using her engines?

A. We were using her engines.

Q. And you were giving orders to the third mate at the telegraph?

A. Yes, sir.

Q. And was there a man at the wheel?

A. Yes, sir.

Recess to 2 p. m.

New York, February 10, 1930.

Met pursuant to adjournment at 2 P. M.; present as before.

HOWARD P. FORT resumed the stand.

Direct examination.

By Mr. Clark:

Q. When you got on the bridge did you have any conversation with Mr. Turnbull?

A. As soon as I arrived on the bridge I informed Capt. Turnbull, or Mr. Turnbull, that there was considerable risk in going up to this dock, and asked him if he knew where he was going.

Q. Did you explain to him why you said that?

A. I told him about the channel, how they were blasting and digging, and the channel had changed very much, there were dredges and drills up there, and you didn't know what you might find, and also all the conditions of the tide——

Mr. Bull: I object to that, your Honor, to his trying to [fol. 45] show any contract here, that Mr. Turnbull could make any contract, and that there was any mutuality at all.

The Court: I will allow it.

A. (Continued.) I explained to him the conditions and he said, "I will take the risks". He said, "If we do as good as we did the last time I will be very much pleased."

Q. Did he refer to some other time or some other boat when he was on the bridge with you?

A. I went through the same channel almost with a sailing ship of the same company.

Q. With Mr. Turnbull on the bridge?

A. Yes, sir.

Q. As a matter of fact, Capt. Fort, did you obtain that morning from the engineers a blue print, so you could get the last information about the situation down there?

A. I got a blue print from the engineers, and I also bought the latest chart.

Q. The blue print you turned over to us, did you?

A. Yes, sir.

Q. Do you know whether you can identify it in any other way than by saying you turned it over to us?

A. It is weather-worn on the back there, that is all; it is my chart, I think.

Mr. Clark: In order to make it clear, your Honor, Mr. Shortridge can testify that Capt. Fort handed it to him; that is the only way I can identify it. The blue print is dated May 16, 1925, the day of the accident.

By the Court:

Q. When you had this conversation with Mr. Turnbull, did you have any thought of not wanting to go up with the ship if he didn't assume the risk?

A. What is that, your Honor?

[fol. 46] Q. I say, if you had any thought of not wanting to go ahead with the ship, if Mr. Turnbull had said that he wouldn't have taken the risk?

A. If he hadn't taken the risk, I would have taken the ship back to anchorage.

Q. After you were under way?

A. Yes, sir.

Q. Where were you when the conversation took place?

A. Right off Port Richmond, three-quarters of a mile from the place where the ship touched.

By Mr. Clark:

Q. This ship was drawing more than any other ship you had taken up there before, wasn't she?

A. 1½ feet, 24 was the largest I had taken up there.

Q. Did you pick up the range?

A. No, I hadn't the ranges on, for I proceeded up Newark Bay——

Q. What happened?

A. She struck something.

Q. Were you on the ranges then, or proceeding as you usually did?

A. The same as I had taken up other ships.

Q. The same as you have taken up ships since?

A. Yes.

Q. Was that the only accident you ever had?

A. Yes, sir.

Q. Do you know what she struck?

A. I don't know what she struck to this day, only what I heard.

Q. After she struck—was Mr. Turnbull there at the time she struck?

A. Yes, sir.

Q. Afterwards did he say anything?

A. Yes.

Q. What did he say?

A. There was a lot of conversation, getting barges, and after things quieted down he said, "This is a hell of a place to take a ship, and no more of my ships will come in here, if I can help it."

[fol. 47] Q. You were paid the pilotage for going on the bridge and taking charge?

A. I received $15 for taking charge.

Q. From the Sun Oil Company, owner of the ship?

A. Yes, sir.

Q. While you were there together, you and the ship, did any other steamer pass you?

A. There was a Federal ship went past to the east of me while we were under stop at Bergen Point.

Q. About how long afterwards?

A. A half an hour afterwards.

Cross-examination.

By Mr. Bull:

Q. Captain, you said you have taken a number of ships up there?

A. Yes, sir.

Q. Had you, on May 15, 1925?

A. Had I taken them up previous to that?

Q. Yes.

A. Many ships.

Q. Up around Bergen Point and into Newark Bay?

A. Yes, sir.

Q. How many ships the size of the Sabine Sun had you taken up there?

A. Quite a few.

Q. Were you familiar with the channel?

A. Yes, sir.

Q. You were?

A. Yes, sir.

Q. Do you know whether the Sabine Sun grounded in the channel or out of the channel?

A. Well, from my ranges, where the channel is supposed to be, she was in the channel.

Q. I asked you if you know whether or not she was in or out of the channel when she grounded; do you know?

A. I am not positive.

Q. You don't know anything about it, whether she was in or out of the channel?

A. I know she was on the ranges.

[fol. 48] Q. You mean at the time she grounded?

A. Yes, sir.
Q. On what range?
A. The one I have testified to, the gas tower and an open street.
Q. Where was the gas tower?
A. Under our stern when I turned around.
Q. And how do you know you were on the range?
A. I came up abreast of it and backed the ship——
Q. As you are going down Kill van Kull?
A. Yes.
Q. How do you know when to turn?
A. I get the tank over the street.
Q. From where you were standing at the time?
A. On the bridge, yes, sir.
Q. Then what do you do?
A. I back the ship down.
Q. You back her?
A. She has got headway on and I back and stand still and come hard aport and go up Newark Bay.
Q. Do you just start up a little to get the headway on and make the turn without stopping at all?
A. A 45-degree turn; sometimes we stop and sometimes we don't.
Q. Did you stop this time?
A. We stopped on something.
Q. I mean, did you stop when you were making the turn before you grounded?
A. No, I was drifting ahead slowly.
Q. How was the tide?
A. Flood tide.
Q. Setting towards Shooters Island?
A. Yes, sir.
Q. How far did you come from Shooters Island?
A. I should judge 800 feet.
Q. 800 feet?
A. About that, I should judge.
Q. And that is as near to Shooters Island as you ever got?
A. With this ship, yes.
[fol. 49] Q. Does that mean Shooters Island pier that stands out from there or what?
A. It means from the outside of the Shooters Island long dock; we use that always as a range coming up.

Q. And you were 800 feet off from that?

A. That is as near as I can put it, yes, sir.

Q. Do you have to have the channel marked on there so you will know where to go?

A. Why, no.

Q. You know those waters, do you?

A. Yes, sir.

Q. The fact that you said before that the channel markings were poor didn't mean anything?

A. It did about the dredging and the channel not being officially opened.

Q. You say the channel was closed then?

A. We couldn't get any reliable charts.

Q. Did you have to have channel markings, or get around there without—you said you didn't?

A. Yes.

Q. You know it without any markings?

A. Yes.

Q. Then why don't you know whether you were in or out of the channel when you grounded?

A. I was in the channel, according to the ranges.

Q. Have you seen the pleadings in this case?

A. No, I haven't.

Mr. Clark: He doesn't know what pleadings are.

Q. The answer to the libel—the libel and the answer to it.

A. I have talked with Mr. Clark about it a couple of times.

Q. And you probably talked to him before he drew the answer?

A. I was here last week——

Q. I mean away back, when the case was started.

A. That is so far back I can't remember.

Q. It is so far back. Well, let me see if this is right. It is pleaded here, and I suppose this information was ob-
[fol. 50] tained from you: "Respondent does not know whether the grounding occurred in the channel"; is that right?

A. I didn't make any such statement.

Q. Didn't you know they must have found that out from you?

A. I had her in the channel according to the ranges, I went up there with other ships——

Q. All you know is about the ranges?

A. That is all we have to go by.

Q. Will you agree with me that if your vessel was setting more over to Bergen Point you still might have had that same range, mightn't you?

A. You wouldn't have it on, you would have it off.

Q. Couldn't you get your ship in such a position that you would have it on?

A. No, if you keep the ranges on, your ship would be in the channel.

Q. Although it drifted over toward Bergen Point?

A. As soon as you drift it gets out of place.

Q. No matter whether the vessel keeps its same position or not?

A. If you go ahead you keep the ranges on; if you go sideways they go out of sight.

Q. How far would you have to go sideways to get them out of sight?

A. Very little; they are very big ranges; as soon as you make a turn and go up the Bay, they disappear.

Q. How soon do they disappear?

A. When you get about half way up to the Texas Oil Company they close in.

Q. You grounded long before you got up there?

A. Oh, yes.

[fol. 51] Q. You were just making the turn, weren't you?

A. Just making the turn, yes.

Q. Are there any buoys around there?

A. Two buoys on the middle ground.

Q. And did you use those at all?

A. No, I did not.

Q. You never used those?

A. No, sir.

Q. Now, you say that you were told, I think, that the ship was drawing 25 feet 6 inches aft, or you saw it in some book?

A. I didn't see it; I asked the men on the bridge, I asked the captain direct, if I remember right, as I ordinarily do, what the draft of the ship was, and he referred me to the third officer, and he told me 25 feet 6 inches.

Q. When was that?

A. When I went aboard the steamer.

Q. You never looked yourself, did you?

A. I did not.

Q. So that you knew before you started to go around Bergen Point that you had a draft in excess of 24 feet, didn't you?

A. I did.

Q. This was only aft, and you didn't know what it was up forward?

A. No, I didn't.

Q. You said before something about seeing it in some book on the bridge; what was that?

A. I didn't see it in the book; I said the third officer took it off of his book.

Q. You saw him look in his book and read it out?

A. Yes.

Q. What book was that?

A. A little logbook, I think, that he keeps.

Q. You don't know what book it is?

A. The same book that they put the bells in on the bridge, or a scrap of paper, just to memorize it.

[fol. 52] Q. What ship was it you took up there a month before?

A. I don't know; I had plenty of other ships; I don't remember the name.

Q. But it was a Sun Oil ship?

A. I never took a ship of the Texas Oil Company.

Q. Where did you take the one you mentioned before?

A. From Trinity Point.

Q. Where is that?

A. Further down the Kill van Kull 5 or 6 miles.

Q. You go down to Bergen Point and around and turn up into Newark Bay?

A. Yes.

Q. And the ship you were talking about a moment ago that Mr. Turnbull was on didn't go up into Newark Bay, did it?

A. The one he was on?

Q. Not the Sabine Sun, the one you had a month before.

A. Mr. Turnbull was on.

Q. But it didn't go up into Newark Bay?

A. No, it went up by the same place that we struck with the Sabine Sun.

Q. You didn't have to turn into Newark Bay to go where you went that time?

A. No.

Q. So you didn't go up the same place or over the same ground or water?

A. Outside of the turning point.

Q. But that was going up or down the Kill van Kull only?

A. Yes.

Q. Now, you say you told Mr. Turnbull when you went on board that this was a dangerous place, did you?

A. Yes, sir.

Q. How did you know it was?

A. Because so many vessels ground there.

Q. Did you ever ground a vessel there?

A. Not previous to this.

Q. I meant previous to this.

A. No.

Q. But you knew it was a dangerous place, did you?

A. Yes.

[fol. 53] Q. How many vessels of that size had you ever taken around there, I mean around Bergen Point, not down Kill van Kull?

A. Quite a few.

Q. As large as the Sabine Sun?

A. Yes, the Texas Oil ships.

Q. You didn't join the Sabine Sun until it got to Port Richmond, did you?

A. No.

Q. Where did you come from there?

A. Out of Port Richmond.

Q. You hadn't been down Kill van Kull?

A. Not that day.

Q. When was it you went down the Kill van Kull and took soundings?

A. 3 or 4 days previous; I can't recollect the date, but previous to the time I took charge of the ship.

Q. Weren't you down there the same day that you joined the Sabine Sun?

A. I can't remember that.

Q. When you took the soundings did you take soundings at this place where you grounded?

A. No, I don't think I did.

Q. What was the purpose of taking soundings?

A. They said there was 30 feet of water there, and I went up to find out if there was that much water.

Q. You mean the whole channel?

A. Yes, sir, the whole channel.

Q. And you went down there and satisfied yourself that there was 30 feet of water in the channel?

A. I satisfied myself the best I could with a lead line.

Q. And the soundings you took showed 30 feet?

A. Not always.

Q. What was the lowest?

A. 24, 23, outside the channel.

[fol. 54] Q. What was the lowest you got in the channel?

A. 26.

Q. When you came on board at Port Richmond why did you take the place of Captain Bennett?

A. Because I was licensed up there, and I was more familiar with the place.

Q. Did he know you were coming to relieve him?

A. I think he did.

Q. Who told him that?

A. My office.

Q. Dalzell Towing Company?

A. Yes, sir.

Q. Somebody there told him that day or the day before?

A. They told me at Port Richmond that the ship was bound in, and for me to take charge of it.

Q. Did they tell you that somebody else would be on until you got there?

A. Yes, sir.

Q. And you relieved him?

A. Yes.

Q. Why didn't he go back on his tug?

A. He wanted to stay on and learn the way into Bergen Point.

Q. Now, you say when you told Mr. Turnbull that this was a dangerous place, he said that he understood, he had been there with you before, and that you did well then, didn't he?

A. He said he would depend on my judgment and if I did as good a job then as I did before, he would be satisfied.

Q. The time before you didn't have any stranding, did you?

A. No.

Q. Do you know whether or not Mr. Turnbull was authorized to agree to assume responsibility?

Mr. Clark: Objected to.

Mr. Bull: He has testified on direct that Mr. Turnbull did say that.

Mr. Clark: I don't think what he knew or thought about this man having authority——

[fol. 55] The Court: If he knows anything about it he can tell.

Q. Do you know?

A. I knew Mr. Turnbull had charge of those ships; in fact, I did all my talking to Mr. Turnbull, not to the captain of the ship.

Q. And that is all you know about it?

A. That is all I know about it.

Q. Did you have authority from the Dalzell Towing Company to make any arrangement like that?

A. We always have that authority; first talk to the captains; if they don't want to go——

Q. Do you always take a ship halfway or part of the way and then if they won't agree to assume all responsibility, you drop the job and go back, is that customary?

A. Yes, sir.

Q. That is customary?

A. Yes, sir. If we advise the captain a job isn't safe, we don't assume responsibility.

Q. Do you think you should wait until you get part ways through with him, and then tell him you won't assume responsibility?

A. These are my orders, that is all I know; I got orders to go aboard the ship at Port Richmond, and I told him as soon as I got aboard.

Q. And what did you agree to do if he assumed the responsibility?

A. I would do my best to take the ship in.

Q. Don't you know that when you are piloting a ship you should do your best anyway?

A. We do our best all the time.

Q. What was your purpose in going down there three or four days before there and sounding?

A. Well, on account of the new dredging and drilling, the channel was only good for 24 feet before that, and the engineers claimed there was 30 feet, and I couldn't get [fol. 56] a reliable chart, and I went down to satisfy myself.

Q. What were you intending to take up there?

A. The Sabine Sun.

Q. How did you know that?

A. I believe the Dalzell had been notified——

Q. Dalzell had told you that that was going to be done?

A. He said the ship is arriving and expected to go to the Texas Oil Company.

Q. And did they tell you to go down, or did you go down on your own account?

A. I went down myself the first chance I got, I dropped the lead line myself.

By the Court:

Q. You say it was only 24 feet in some places in the channel?

A. Yes, sir.

Q. How did you expect to get through?

A. Sometimes you go down there and you don't know what you hit. They are blasting rocks all the time and there is mud.

Q. You said there was 24 feet?

A. 26 feet in and 24 feet.

Q. How did you get 27 feet 6 inches?

A. 25 feet 6 inches it was at high water.

By Mr. Bull:

Q. It was low water when you took the soundings?

A. Yes.

Q. What time of day?

A. I can't recall; it was low water when I took the soundings.

Q. As you make the turn to go into Newark Bay, the tide would fetch you over to Shooters Island?

A. There is a tide we meet when we turn the ship; it is a very dangerous place to turn.

Q. Won't it set you over?

A. Until you meet the tide coming from the other direction.

[fol. 57] Q. And you are close up to Shooters Island?

A. Oh, yes, when you pass that way.

Q. In making that turn is it your purpose to keep close to Shooters or over to Bergen Point?

A. Not necessarily; you try to keep in the middle of the channel.

Q. I am trying to find out where that is.

A. I go by ranges.

Q. How far is the middle of the channel from where you grounded?

A. It was only 300 feet.

Q. How far is it from where you grounded?

A. I don't know.

Q. How far is it from Shooters Island?

A. I figured 800 or 900 feet.

Q. The middle of the channel is?

A. That is only an assumption.

Q. So if you turn in the middle of the channel 800 feet off Shooters Island pier, the tide would be apt to keep you over?

A. The tide would take my stern and the tide coming from the other direction would take her bow and turn her on a pivot.

Q. That is, after you have gone by where you stranded?

A. Three tides are met there.

Q. Did you meet the other one when you got up above where you stranded?

A. You meet them all there.

Q. All in one spot?

A. Yes, sir.

Q. Where you started to turn?

A. Yes, sir.

Redirect examination.

By Mr. Clark:

Q. Did the three tugs obey all the orders that were given them?

A. Yes, sir.

Q. They did everything that was required of them, did they?

A. Yes, sir.

[fol. 58] ALBERT F. BENNETT, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Clark:

Q. What is your business, Capt. Bennett?

A. Tugboat captain.

Q. What licenses do you hold?

A. Inland water, New York Bay and Harbor.

Q. How long have you held it?

A. 24 years.

Q. How long have you been following the water?

A. 29.

Q. And your specialty is piloting steamers around New York Harbor, docking and undocking, and so forth?

A. Yes, sir.

Q. You went to the steamer Sabine Sun on the morning of May 15, 1925?

A. Yes, sir.

Q. You boarded her where?

A. Staten Island, Port Richmond.

Q. You went on her bridge?

A. Yes, sir.

Q. And you were the tugboat captain in charge of the maneuver up to a certain point?

A. Yes, sir.

Q. How far did you take her?

A. To Port Richmond.

Q. And who came on board there?

A. Captain Fort.

Q. You understood that he was coming on board, did you?

A. Yes, sir.

Q. Your license carried you how far?

A. Well, we thought at that time it did cover those waters, but when I got my examination there was no ex-

amination for those waters up there, and they have got an examination for them, and it turned us fellows out.

Q. The reason you turned over the pilotage of the boat from Port Richmond on was because your license didn't [fol. 59] cover it, or you didn't think it did, and Capt. Fort's did?

A. Yes, sir.

Q. Does your license now cover them?

A. Yes, sir.

Q. Were you on the bridge when Capt. Fort came on the bridge?

A. Yes, sir.

Q. Who else was there?

A. Capt. Turnbull, the captain of the ship, one of the officers, and a quartermaster.

Q. Who was at the telegraph?

A. One of the officers.

Q. The quartermaster at the wheel?

A. And the captain of the ship and Mr. Turnbull were at different parts of the bridge.

Q. Did you hear any conversation between Capt. Fort and Capt. Turnbull?

A. Yes. He told Capt. Turnbull that it was no safe place to take a ship with that draft, and Capt. Turnbull said something about responsibility, if he did as good a job as he did before—which job he meant, I didn't know.

Q. But you heard Capt. Fort talking to Mr. Turnbull about the dangerous job it was, didn't you?

A. Yes, sir.

Q. There is no question in your mind about that?

A. No, sir.

Q. Can you remember any of the exact words you heard?

A. Only I heard Capt. Turnbull say that he would be responsible, and something about if he done the job as good as he done before—I couldn't get exactly, for I was standing too for away to get it all.

Q. But you did hear the conversation?

A. Yes, sir.

Q. You remained on the bridge, did you?

A. Yes, sir.

[fol. 60] Q. And you were on the bridge at the time she brought up?

A. Yes, sir.

Q. And at that time—try not to testify what you know now—but at that time did you know what the ranges were there and what the course up there was?

A. Not exactly; not for deep water.

Q. Not for a vessel of this draft?

A. No.

Q. So you can't say whether she was in the channel or not, can you?

A. No, sir.

No cross examination.

GEORGE DALZELL, being duly sworn and examined as a witness for the respondent, testifies:

Direct examination.

By Mr. Clark:

Q. You are an officer of the Dalzell Company?

A. Yes, sir.

Q. Did you ever receive any notice of survey on the Sabine Sun?

A. No.

Q. Never?

A. Never.

Q. What was the first you ever knew that any claim was to be made against your company or the tugs that you are interested in?

A. In March, 1926, we got a letter from Messrs. Duncan & Mount, saying that we had—

Q. That was the first you had heard of it?

A. Yes.

Q. The first claim that was made?

A. Yes, sir.

Q. About ten months afterwards?

A. Yes, sir.

Q. Do you still do business for the Sun Oil Company?
A. Yes, sir.
Q. You still do business with Mr. Turnbull?
A. Yes, sir.
[fol. 61] Q. Have you ever heard any question ever raised about the pilotage clause?
A. No, we always went on the same as we always done.
Q. And you are still doing business?
A. Yes.
Q. You are still doing it the same as you always did?

Objected to.

The Court: Objection sustained.

Q. Have you piloted any steamers recently for the Sun Oil Company?
A. Yes. We are waiting orders for one to take her out now.

Mr. Clark: We offer in evidence a stipulation giving the bearings and position of the steamer as taken by A. J. Fulton.

(Received and marked Respondent's Exhibit J in evidence.)

Mr. Clark: Those bearings, your Honor, are the ones I referred to in the opening as the bearings which Mr. Shortridge used in placing the steamer. Now I have here a blue print which Mr. Fort handed to Mr. Shortridge, and if Mr. Bull wants it I will have Mr. Shortridge take the stand and say it is the one.

Mr. Bull: I will agree to that.

Mr. Clark: The blue print is offered in evidence.

Mr. Bull: This is an old one, 1923, two years before that; I think we ought to have one a little more up-to-date.

Mr. Clark: This is the one we got from the Army Engineers that morning.

Mr. Bull: Well, I will agree that it is the one they got, without the marks that are on it.

[fol. 62] Mr. Clark: We can't claim that the plotting is part of the exhibit.

(Received and marked Respondent's Exhibit K in evidence.)

Respondent rests.

REBUTTAL

A. J. FULTON, being duly sworn and examined as a witness for the libelant, testifies:

Direct examination.

By Mr. Bull:

Mr. Clark: What is the purpose of calling Mr. Fulton? I thought we stipulated——

Mr. Bull: But you say that the draft is more than it was, that is all I want to ask him, if that is satisfactory?

Mr. Clark: It is stipulated.

(Witness withdrawn.)

MORTIMER R. FOUNTAIN, being duly sworn and examined as a witness for the libelant, testifies:

Direct examination.

By Mr. Bull:

Q. Captain Fountain, what is your occupation?

A. Master and pilot of steam vessels?

Q. How long have you held a license?

A. 34 years.

Q. Did you hold a license for the waters around the Kill van Kull and Newark Bay in May, 1925?

A. Yes, sir.

[fol. 63] Q. And for how long before that?

A. Well, about 23 years previous.

Q. Are you familiar with the channel both through the Kill van Kull and around the Point and up into Newark Bay?

A. Yes, sir.

Q. Have you taken many ships up through there?

A. Quite a few.

Q. How large?

A. Oh, ships—well—I had some as high as 140,000 barrels.

Q. What draft?

A. I have taken, since then I have taken as high as 30½.

Q. How high had you taken before that?

A. 27—28—about 27½.

Q. And how large a vessel have you taken from the standard of dimensions, have you any idea?

A. About a 6,000 ton vessel.

Q. Do you know the Sabine Sun?

A. Yes, sir.

Q. Have you taken, or had you taken before May 15, 1925, many vessels as large as that up there?

A. They were all as large as her.

Q. Can you give us any idea of how many you have taken up there per month or year, or something like that, just a rough average?

A. About 75 a year.

Q. Have you taken up all the Texas Company tankers?

A. Yes, sir.

Q. And those are as large as the Sabine Sun and larger?

A. About the same size; some a little bit larger.

Q. Now, this answer of yours doesn't just apply down Kill van Kull, around Bergen Point, and up into Newark Bay, does it?

A. Yes, sir.

Q. Have you ever stranded a vessel going around Bergen Point?

A. No, sir.

Q. Did you see the Sabine Sun on May 15, 1925?

A. Yes, sir.

[fol. 64] Q. Where was she at the time you saw her?

A. Well, she was aground at the Point between Shooters Island and Bergen Point Lighthouse.

Q. Do you know which side of the channel?

A. On the starboard side of the channel—that is on the east side.

Q. On the east side. Was she in the channel or out of the channel?

Mr. Clark: If your Honor please, I don't think the witness can testify as to that.

The Court: He said he knew where the channel was.

Mr. Clark: We have got the bearings right here.

The Court: I will allow him to answer.

Q. Was she inside of the channel or out of the channel?

A. She was outside the channel when I got to her.

Q. Did you notice what part of her was on the ground?
A. The bow, forward of the bridge.
Q. Did you know what her draft was then?
A. Well, I understood somebody to say that she was——

Mr. Clark: Objected to.

Mr. Bull: That is Captain Fort's testimony.

Mr. Clark: Captain Fort was on the vessel in the capacity of the man who was to take charge and inquired as usual and received the answer as usual—that is an entirely different matter.

Mr. Bull: When he could very well have looked to see.

[fol. 65] The Court: You can ask him what he knew.

Q. Had you ever taken a vessel where this one was grounded?

A. No, not where she was when I got to her, not of that draft.

Q. After you got there what was done?

A. Well, I asked Captain Fort if I could be of any assistance to him, and he asked me if I would come up on the bridge, and I went up on the bridge and we talked matters over, and I was going to help him out all I could, and in the meantime a gentleman from the Texas Oil Company came down on one of the Texas tugs, and asked what was the matter, and we acquainted him that the vessel was ashore, and I got busy with him and asked him if he couldn't give us a couple of lighters and get some of the cargo off and see if we couldn't get her off before any more damage was done; and they done that, and that evening, between half past six and seven o'clock, we got her so we could move her, and after got up to the Texas Dock.

Q. Did you learn what her draft was when you got her off?

Mr. Clark: What do you mean by "learn"?

Q. Well, do you know what it was?
A. I was informed that it was——

Mr. Clark: I object.

The Court: He was there when they were getting her off; I will allow it.

A. (Continued.) I asked for her draft, what she was drawing aft, and they told me she was drawing close to [fol. 66] 26½ aft. Her bow had been lightened up.

Q. How was she forward?

A. We backed her up and backed her into the channel parallel to the Staten Island shore, and maneuvered her in such a position to get her up and make the turn between Shooters Island and Bergen Point light, and then brought her up to the dock.

Q. When she was pulled back off the rock or ground, or whatever it was, she was pulled back into Kill van Kull?

A. Yes.

Q. So in order to get her up to the Texas Dock you had to make the same turn that had to be made before, is that it?

A. Yes.

Q. Who directed the navigation then?

A. She was turned over to me then and of course I done all I could to get the ship right.

Q. Did you take her where she was when you first saw her aground?

A. I took her off there and straightened her up and brought her up to the Texas Oil pier.

Q. I mean after you had taken her off the ground and taken the turn—did you take her in the same place where she had been aground before?

A. Oh, no.

Q. When you take vessels of that size up there how do you make the maneuver around the bend there?

A. Well, I generally go up—easy by Bergen Point Light until my bows is I judge about half way between Bergen Point Light and Shooters Island, and then I start to make the turn, allowing for a certain amount of sweep which will bring you nearer when I am straightened up to Shooters Island.

[fol. 67] Q. How near will that bring you to Shooters Island?

A. About one-third of the distance away from Shooters Island, that is, between Shooters Island and Bergen Point Lighthouse.

Q. Have you any idea what it would be in feet?

A. No, I never measured it.

Q. And having done that, what would you next do?

A. Straighten her up, get her on ranges; I use a church steeple on Staten Island, and the middle tower of the rail-

road bridge across Newark Bay, and head her between those two marks and go up.

Q. You get her turned around and lined up and turn around and take her straight up, is that it?

A. Yes.

Q. How far do you keep off from this point where you found her stranded?

A. Generally with a draft I have been taking up there, I keep her half way between where she was and Shooters Island, but I don't know how much further off you can go that way; that is the way I generally do.

Q. How wide is the channel there?

A. I judge it to be 500 feet, safely 500 feet.

Q. Did you have any trouble getting the Sabine Sun up there this time after she was backed off?

A. No; after we backed off and made the turn we went up to the dock and I turned her over to Captain Fort.

Q. And you left?

A. He took charge of the docking then.

Q. How was the tide when you got there, do you know?

A. Well, the tide was about done when I got there.

Q. And how long after that was it when you got her off?

A. Pretty close to three hours.

[fol. 68] Q. Close to three hours. So was the tide much lower at that time?

A. Well, the tide had fallen some.

Q. She couldn't stand as great a draft then as she could when she stranded?

A. Hardly, with a falling tide.

Q. The tide sets down from Shooters Island, does it?

A. There is a channel back of Shooters Island, sort of a sluice, and the last of the tide from Elizabethport strikes the dock there and tends to set from the north side of Shooters Island over toward Bergen Point Light.

Q. And when would that affect a ship?

A. That generally comes along towards high water, at Governor's Island high water.

Q. Would that affect your ship as soon as you attempted to make the turn or after?

A. No, you have got to turn.

Q. And you are headed straight up into Newark Bay at the time it hits?

A. Yes.

Q. How do you work your engines and tugs then?

A. After we get the turn made and the ship in the proper position to head up Newark Bay we generally give them full speed ahead to get steerageway on.

Q. How were the conditions on this day for this maneuver?

A. Well, of course, the weather was calm, but as far as the grounding of the vessel is concerned, I was not there when that happened, and of course I can't tell what conditions were at that time.

Q. But the tide was the last of the flood when you got there?

A. Yes.

Q. So it must have been flood tide?

A. It must have been flood tide when she came up there.

[fol. 69] Q. Is that what you want to make the maneuver?

A. Well, as a general rule, when I am going up I figure to have it about slack water there.

Q. That would be the last of the flood?

A. Yes.

Q. What time was it when you got there?

A. I should judge it was about 4 o'clock, or perhaps a couple of minutes before, maybe 5 or 10 minutes before, as near as I can recollect.

Cross-examination.

By Mr. Clark:

Q. How did you happen to be there?

A. I had been down on a job at the Mexican Petroleum Dock at Carteret, and as soon as I finished I started on my way back for New York.

Q. How can you tell the time you got there?

A. I docked the ship at Carteret, but as near as I can recollect that date it was around maybe five or ten minutes before; I know it was just shortly before 4 o'clock.

Q. Have you some way of finding out just when it was?

A. No, I didn't get a report of it.

Q. You gave a statement to somebody?

A. No, I never gave a statement to anybody.

Q. You never gave a statement about it?

A. No, sir.

Q. So you are now testifying about events nearly five years ago, and have never spoken of them since?

A. I kept it in mind pretty well, thinking about the thing, thinking the same thing might happen to me.

Q. What makes you think that?

A. Well, it may happen to anybody.

Q. It was a very difficult and dangerous place?

A. Well, it was not a difficult place; it was not an unsafe place, but you have to be very careful.

[fol. 70] Q. Several other ships struck on something down there?

A. Yes, they have.

Q. They don't generally know what they do strike on?

A. Well, I don't know—maybe I have been lucky.

Q. You know about the Franklin K. Lane?

A. Yes.

Q. You know about the Cerro Azul, and some others have struck on the bottom around where the dredging was being done?

A. Yes.

Q. And both before and since this accident?

A. Yes.

Q. And it was all around where that drilling and blasting is?

A. Well, around in that vicinity.

Q. And you may be the lucky one of all?

A. That is so.

Q. You know Captain Reynolds?

A. Yes.

Q. He has been piloting down there a long time?

A. Yes.

Q. As long as you have?

A. No.

Q. You are there the longest?

A. Yes, somewhat of a pioneer.

Q. Captain Reynolds struck something down there?

A. He struck something two or three times.

Q. Do you know Captain Slauer?

A. Yes, sir.

Q. He struck down there, didn't he?

A. Yes. Maybe they haven't picked my place out yet.

Q. With all these boats striking down there it must be a dangerous place?

A. Yes, it is. Anything is dangerous nowadays with the vessels we get to handle.

Q. What is the matter with them?

A. I don't know; things go wrong, you can't be bothered.

Q. Well, as near as you can say about when you got there was a little before 4 o'clock?

A. Just about that.

[fol. 71] Q. Now, did I understand you to say that you went on board of the vessel and she was turned over to you?

A. Not exactly turned over to me; Captain Fort called me in and we talked things over, and we made up our mind to get busy then, and do what we could to get the ship off. It was a sort of a worry about what would happen when the next flood tide made. So the folks at the Texas Oil Docks were good enough to let us have a couple of lighters and I thought if we pumped all the tanks would hold we might get enough forward before anything worse happened.

Q. You went on board and were assisting and giving your advice as to getting her afloat?

A. Yes, sir.

Q. You don't want the Court to understand that Captain Fort turned the steamer over to you?

A. Not exactly, but we talked it over.

By the Court:

Q. Did you give instructions after you got on board?

A. After we got the vessel light enough to float, I gave the orders to those in charge.

By Mr. Clark:

Q. You took full charge?

A. You can't take full charge, you are only there to assist, not as long as there is a master on the ship.

Q. I want to know whether you want the Court to understand that you took charge of the ship.

By the Court:

Q. Did you give them orders about bells and how to place the engines?

A. He sort of acted on my advice and between the two of us we maneuvered her back.

[fol. 72] By Mr. Clark:

Q. Who? Captain Fort remained in charge?
A. He stayed on the ship.
Q. Did he remain in charge?
A. Yes, I guess so.
Q. Do you know Captain Rex?
A. Yes.
Q. You know he had one of the Pan-American ships strike there, don't you?
A. Yes.
Q. Do you know Captain ——?
A. Yes.
Q. He had one too?
A. Yes.
Q. That was right near the dredge?
A. Well, that was quite a ways off.

By the Court:

Q. Do you know anything about the ranges there, at the end of the street and the gas tank?
A. Well, I have ranges that I use myself; there is a gas tank as you go up and as that gas tank begins to show over the street you begin to turn, and when you have made the turn there is a house on the west side of the street, that when you have made the turn safely, this gas tank shows over this house, backward; after that shows you know you are clear of those spots that are on the Point.

By Mr. Clark:

Q. You mean the 18-foot spot?
A. Yes.
Q. And those are the same ranges that Capt. Fort was talking about?
A. It may be the same ones.
Q. You use the same ones?
A. I never had anyone tell me what ranges they used. I used my own.
Q. You didn't do your navigation by any aids established by the Government?
A. Well, no.
Q. There weren't any?
A. No.
[fol. 73] Q. You had to use your own?
A. Yes.

Q. And that was the gas tank and opening up the street?

A. You get the gas tanks opening up by the street, and the proper way is to have the gas tank over the house that is on the west side of the street, and then you begin to turn.

(Witness excused.)

LEOPOLD A. TURNBULL, recalled, testified as follows:

By Mr. Bull:

Q. Did you hear Captain Fort's statement that he told you that this was a dangerous place and you told him that was all right, that you would assume the responsibility; did you hear him testify that?

A. Yes, sir.

Q. Did you make any statement of that kind to him?

A. No, sir.

Q. Did you tell him anything about your assuming responsibility, or what you would do about the way he took her around the Point?

A. No, sir, I had no authority to do it.

Q. You had no authority to do it?

A. No, sir.

By Mr. Clark:

Q. Did you hear what Captain Fort said about the remark you made after she brought up?

A. Yes, sir.

Q. You heard what he testified that you said?

A. Yes, sir.

Q. Do you remember saying that now?

A. No.

Q. Do you deny saying that?

A. I don't deny it, but I don't remember it.

[fol. 74] Q. Are you still doing business with the Dalzell Company?

A. Yes, sir.

Q. And as far as you know, there has never been any question taken up with them since this accident about this pilotage clause?

A. Not as far as I know.

Q. You have known about the pilotage clause, haven't you?

A. Since there was some talk about it.

Q. But you have never done anything about it?

A. No, sir.

Q. You have been going around in the same old way, haven't you?

A. Yes, sir.

(Witness excused.)

Both sides rest.

[fol. 75] LIBELANT'S EXHIBIT 1

February 4, 1929.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, 27 William Street, New York, N. Y.

(Attention—Mr. Clark.) SS. Sabine Sun—Dalzell Tugs.
Our No. 9946

DEAR SIRS: We understand as a result of a conference between our Mr. Duncan and your Mr. Clark that you will now agree, for the purpose of this trial, to admit operation by the Dalzell Towing Company of the tugs Dalzellite, W. F. Dalzell and Fred B. Dalzell, Jr. If our understanding is correct, kindly confirm same and oblige,

Yours very truly, —— ——.

HWD. H.

[fol. 76] LIBELANT'S EXHIBIT 2

[Letterhead of Burlingham, Veeder, Fearey, Clark & Hupper]

27 William Street,
New York, May 20, 1929.

Sabine Sun—Dalzell Tugs

Messrs. Duncan & Mount, 27 William Street, New York City.

DEAR SIRS: We acknowledge receipt of your letter of May 14, 1929, and confirm your understanding as expressed in your letter of February 4, 1929.

Very truly yours, Burlingham, Veeder, Fearey, Clark & Hupper, Chauncey I. Clark.

CIC:H.

[fol. 77] LIBELANT'S EXHIBIT 3

June 28, 1929.

Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, 27 William Street, New York City.

(Att. Mr. Clark.) S. S. Sabine Sun—Our 9946

DEAR SIRS: From your letter of June 19 and our telephone conversation of today, we understand that you are not authorized to agree to the last clause in paragraph number two of our letter of June 15, but that you will agree not to offer any evidence that the master of the Sabine Sun knew of or overheard any agreement between the tug captain and Mr. Turnbull such as is alleged in the answers to the libel. In this situation we understand that our stipulation in this case is as follows:

1. That the master was not guilty of any negligence contributing to the grounding of the Sabine Sun.

2. That the master of the Sabine Sun was not a party to the alleged agreement between the tug captain and Mr. Turnbull, and that no evidence will be offered tending to prove that the master did know of or hear such an agreement.

Will you kindly confirm that our agreement is as set out in the two paragraphs above.

Very truly yours, ——— ———.

FAB:T.

[fol. 78] LIBELANT'S EXHIBIT 4

[Letterhead of Burlingham, Veeder, Fearey, Clark & Hupper]

27 William Street,
New York, July 3, 1929.

Sabine Sun. Attention of Mr. Bull.

Messrs. Duncan & Mount, 27 William Street, New York City.

DEAR SIRS: We acknowledge receipt of your letter of June 28, and confirm your understanding.

Very truly yours, Burlingham, Veeder, Fearey, Clark & Hupper, Chauncey I. Clark.

CIC:A.

[fol. 79] RESPONDENT'S EXHIBIT A

Sun Oil Company

Philadelphia, November 14, 1923.

Dalzell Towing Company, Inc., 21-24 State Street, New York, N. Y.

GENTLEMEN: Your invoice of October 16 against the SS. "Sabine Sun", charge No. 7729, amounting to $366.25, has not been returned to this office for payment. We learn that the invoice has not been approved by our Mr. Turnbull for the reason that although the tugs did arrive alongside the ship and the vessel was not ready, your tugs left the vessel and worked on another.

Mr. Turnbull has been away much of his time and explains why he has not written to your Company about this charge of $56.25, which has been questioned by him and up to the present time has not had his approval.

We will, therefore, appreciate a report from you so it can be sent to Mr. Turnbull and hasten settlement of your invoice.

Yours very truly, Sun Oil Company. Chas. R. Innis, Marine Department.

CRI:NF.

[fol. 80] RESPONDENT'S EXHIBIT B

November 15th, 1923.

Sun Oil Company, Philadelphia, Pa.

Att. Mr. Chas. R. Innis

GENTLEMEN: We thank you for your favor of the 14th inst. with reference to our charge #7729 in the amount of $366.25 for towage services rendered the SS. "Sabine Sun" and in accordance with your request are very pleased indeed to give you a report concerning the item of $56.25 for services to the ship.

On the afternoon of October 10th, we received orders from your Mr. Ray to dispatch tugs to Pier 5, Bayonne for the purpose of assisting the above mentioned vessel to the west side of Pier 2, Tidewater and to have the boats alongside of the ship at 8 A. M. sharp. In order for our tugs to be there at the appointed time, it was necessary for us to

dispatch them from their place of lay up at 7:15 A. M. The tugs arrived alongside of your ship promptly at 8 and upon discovering that the ship was not ready and would not be so for some time to come, they 'phoned our office and informed our dispatcher of this. Several minutes after we had heard from our tugs, your Mr. Turnbull 'phoned our dispatcher saying that the ship was not ready to shift and [fol. 81] that he would let us know later as to the correct time. We again communicated with our tugs and sent them on other work.

While we appreciate the fact that no services were actually rendered your ship, we have found it necessary within the last four or five years, to make running time charges for our tugs and it has, therefore, become a custom of the Port, all companies paying such charges. We are attaching herewith a towage schedule and would like to call your attention to the last paragraph marked with an "X".

We feel quite sure that when you take this matter up with Mr. Turnbull that you will find our contentions to be correct.

Trusting the above explanation is quite satisfactory to you, we are

Yours very truly, Dalzell Towing Company, Inc.
—— ——, Treasurer.

LHD—G.
Encl.

[fol. 82] RESPONDENT'S EXHIBIT C

Telephone Connections. Cable Address: Dalzelline

Dalzell Towing Company, Inc., Agents for Sea, Harbor & Coast Towing, 21-24 State Street, New York

Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.

Docking and/or Undocking Vessels

East River

Brooklyn Shore from Bay Ridge Avenue to Navy Yard and points opposite	$25.00 per tug
Brooklyn Navy Yard to Eastern District Terminal, L. I. C. and points opposite	30.00 " "
Port Morris	80.00 " "
Steinway	90.00 " "

North River

From Battery to 17th Street, Hoboken and points opposite	$25.00 per tug
From 17th Street, Hoboken to Weehawken and points opposite	30.00 " "
From Weehawken to Guttenberg Coal Dock and points opposite	40.00 " "
From Guttenberg Coal Deck to Edgewater and points opposite	50.00 " "
Yonkers	75.00 " "

[fol. 83] Lower Bay, Kill Von Kull, Newark Bay

Staten Island Piers	$35.00 per tug
Constable Hook Piers	35.00 " "
Bayonne Piers	35.00 " "
Black Tom	40.00 " "
Claremont	40.00 " "
Greenville	40.00 " "
Port Johnson	45.00 " "
Mariner's Harbor	45.00 " "
Bergen Point	60.00 " "
Port Newark	80.00 " "
Kearny	90.00 " "
Bayway	75.00 " "
Carteret	85.00 " "

Other Points Than Above Described

The docking or undocking of vessels at other points than designated above to be charged for at the rate of $15.00 per hour from the time of the departure of the tug until her return, but in no case shall the charge be less than the minimum charge for the nearest point thereto in the above schedule.

Transporting Vessels

From Dock to Dock, Anchor to Dock or vice versa, the charge will be at the rate of $15.00 per hour per tug with a minimum charge of $30.00 per tug, but in no case shall a

vessel be transported for less than the docking or undocking charge given in schedule.

The running time to and from vessels to be added and is chargeable.

[fol. 84]

Shifting

The shifting of barges and lighters in and about the slips to be charged for at the rate of $12.50 per hour with a minimum charge of $12.50 or one hour between the hours of 7 A. M. and 5 P. M. Before 7 A. M. and after 5 P. M. the charge is $17.50 per hour with a minimum charge of $17.50 or one hour.

When ice interferes with navigation then the rate will be $20.00 per hour with a minimum charge of $20.00 or one hour. Before 7 A. M. and after 5 P. M. the charge will be $25.00 per hour with a minimum charge of $25.00 or one hour.

The running time to and from piers is to be charged for as per schedule.

Services

All services in Bay, attendance with surveyors, clerks, etc. to and from steamers in Bay at the rate of $15.00 per hour per tug. Minimum charge, one hour.

Detention

Detention of tugs caused by vessels not being ready and other conditions beyond our control at the rate of $15.00 per hour per tug.

When tugs are ordered to a certain point to perform services and the orders are cancelled the running charges shall prevail plus waiting time with a minimum charge of one hour or $15.00 per tug.

Supplying Steam

Services of tugs supplying steam are to be charged for at the rate of $15.00 per hour. Running time chargeable.

[fol. 85]

Overtime

$7.50 per hour, per tug additional before 7 A. M. and after 5 P. M. when tug is engaged in rendering a service. Minimum charge one (1) hour.

$7.50 per hour, per tug before 7 A. M. and after 5 P. M. when tug is obliged to wait out in order to render a service with a minimum waiting charge of one hour plus regular towage charges.

Sundays and Holidays

All services performed on Sundays and Holidays are to be charged for at one and one-half times the above rates.

Ice Conditions

The above prices are subject to navigation not being impeded by ice conditions, in which case the charge will be $25.00 per hour per tug, except for shifting barges as specified above. Running time chargeable.

Schedule of Running Time

Battery to Navy Yard	15 minutes each way
Battery to Williamsburg	30 " " "
Battery to Long Island City	45 " " "
Battery to Erie Basin, Brooklyn	15 " " "
Battery to Bay Ridge Avenue, Brooklyn	30 " " "
Battery to Staten Island, Constable Hook and Bayonne	45 " " "
Battery to 10th Street, Hoboken	15 " " "
Battery to Weehawken	30 " " "
Battery to Guttenberg	45 " " "
[fol. 86] Battery to Edgewater, N. J.	1 hour each way
Battery to Port Johnson and Mariners Harbor	1 " " "
Battery to Bergen Point	1 " " "
Battery to Bayway	1½ hours each way
Battery to Carteret	1¾ " " "
Battery to Amboy	2 " " "
Battery to Kearny	2 " " "
Battery to Port Newark	1½ " " "

Pilotage

When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her

own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom.

[fol. 87] RESPONDENT'S EXHIBIT D

[Billhead of Dalzell Towing Company, Inc.]

Bills sent to Sun Co., New York, October 16, 1923. SS "Sabine Sun" and Owners. Charge No. 7729

1923.

Oct. 11.	Services of tugs running to Pier 5, Bayonne with orders to assist steamer to West Side Pier 2, Tide Water. When tugs arrived alongside they were informed vessel was not ready: Tugs: "Lloyd H. Dalzell", "G. H. Dalzell", "Dalzellea", 7:30 to 9 AM—1½ hours @ $12.50—$18.75—3 tugs	$56.25
11.	Services standing by waiting 1 hour for vessel to finish unloaded cargo and towing from Pier 5, Bayonne to West side Pier 2, Tide Water Dock (no steam): Tugs: "Dalzellea", "C. P. Raymond", "G. H. Dalzell", "Lloyd H. Dalzell," 11:30 to 3 PM—2½ hours @ $12.50—$43.75—4 tugs	175.00

14. Towing from Pier 2, Tide Water Docks, Bayonne to Staten Island (Light, steam): Tugs: "E. T. Dalzell", "Fred B. Dalzell", "Dalzelline",		
3 tugs at $30.00	$90.00	
Sunday rate ½ additional	45.00	
		135.00
		$366.25

When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom.

[fol. 88] RESPONDENT'S EXHIBIT E

Sun Oil Company

Marcus Hook, Pa., December 27, 1923.

Dalzell Towing Company, New York, New York.

GENTLEMEN: In checking your invoices of various times we note you have charged us for docking our ships at Tidewater Plant $30.00 per tug and one half time for Sundays. At the Standard Oil Co., Constable Hook you have charged $22.50 and one quarter extra for Sunday. Will you kindly explain these rates and if possible send us a schedule of your rates for doing this class of work in and around New York.

Yours very truly, Newlin Carr, Sun Oil Company.

NC/GR.

[fol. 89] RESPONDENT'S EXHIBIT F

December 28, 1923.

Sun Oil Company, Marcus Hook, Pa.

Attention Mr. Newlin Carr

GENTLEMEN: We acknowledge receipt of your favor of December 27th with reference to invoices from our Company for docking charges on your ships.

We assume that the item which you refer to at Constable Hook has been billed by us to the Standard Oil Company of New Jersey in error under an old contract which we have had with this Company and which expires on the 31st of this month.

We enclose herewith copy of our tariff rates and all our bills should conform with this tariff.

Yours very truly, Dalzell Towing Company, Inc.
—— ——, Vice-President.

FBD:EL.

[fol. 90] RESPONDENT'S EXHIBIT G

Sun Oil Company

Marcus Hook, Pa., June 6, 1924.

Dalzell Towing Company, 21-24 State Street, New York, N. Y.

GENTLEMEN: I am in receipt of your invoice of May 29, 1924, in reference to towage on the SS "Delaware Sun" and wish to call your attention to the fact, on May 27th this ship was tied up at dock at Constable Hook at 5:30 P. M. which would indicate that one-half hour over time rate was all that should have been charged against this item. On May 28th we note that you have charged one and a half hours over time for three tugs and wish to call your attention to the fact that the tugs were ordered for this ship at 4:00 P. M. and only two tugs arrived at dock. The third tug did not arrive until 5:30 P. M. when the ship was taken from the pier to stream.

In the meantime we are holding your invoice awaiting credit that we might pass same for payment.

Yours truly, L. A. Turnbull, Sun Oil Company.

LT/GCR.

[fol. 91] RESPONDENT'S EXHIBIT H

[Billhead of Dalzell Towing Company, Inc.]

Bills Sent to Sun Oil Co. New York May 29, 1924. SS. "Delaware Sun" and Owners. Charge No. 12065

1924.			
May 27.	Towing from anchor off Staten Island to East side Pier 5, Constable Hook:		
	Tugs: "Lloyd H. Dalzell", "Fred B. Dalzell", "Dalzelline", 3 to 6:15 P. M.—3¼ hours @ $12.50—1 tug	$40.62	
	2 additional tugs assisting to berth—2 tugs @ $30.00.	60.00	
	Overtime rate after 5 P. M. —1¼ hrs. @ $6.25 7.81—3 tugs	23.43	
			$124.05
28.	Towing from East side Pier 5, Constable Hook to Staten Island (Light, steam):		
	Tugs: "Dalzelline", "Fred B. Dalzell Jr.", "Fred B. Dalzell", 3 tugs @ $30.00.	90.00	
	Overtime rate after 5 P. M. —1½ hours @ $6.25—9.37 —3 tugs	28.11	
			118.11
			$242.16

When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her

own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom.

[fol. 92] RESPONDENT'S EXHIBIT I

June 10th, 1924.

Sun Oil Company, Marcus Hook, Pa.

Att. Mr. L. A. Turnbull

GENTLEMEN: We beg to refer to your favor of the 6th inst. concerning our bill for towage services rendered the SS. "Delaware Sun" on May 27th and 28th respectively, and we note that there is a question in your mind concerning the time originally billed you.

In reply we wish to advise that on May 27th we finished docking the above mentioned steamer at 5:30 P. M. which is your contention, and rendered you an invoice for the three tugs to 6:15 P. M. The additional ¾ of an hour added to our invoice covers the running time of the tugs back to the Battery Landing, which charges is in accordance with our towage schedule. For your information, we are attaching one of our schedules herewith.

With reference to our charge of the 28th for undocking the steamer at Pier 5, Constable Hook, we wish to say that when you originally called our Mr. Sullivan to Place the order with him, you asked to have the boats there at 4 P. M. Our Mr. Sullivan accepted the order for this time but after talking to one of our captains who was in the vicinity of the "Delaware Sun", he was informed that there [fol. 93] was another ship in the same slip with your steamer and it, therefore, would be impossible to take the vessel out until dead slack water, which was about 6 P. M. Our Mr. Sullivan informed our Capt. Maclary of the Dal-

zelline to run into the pier and inform you of this, which the writer understands he did. To the best of our recollection, you called us again in reply to this and advised us of the importance of the vessel sailing as near 4 o'clock as possible.

At the time the order was accepted we had no means of knowing whether there was another ship in the same slip with the "Delaware Sun" inasmuch as we do not do the business for the owners of this other vessel. In any event, it was absolutely impossible to take your ship out at that time without doing serious damage and the tugs were, therefore, obliged to wait until 5:30 P. M., at which time they started her out, and which was about 15 or 20 minutes before dead slack water. Our Captains took the ship out under protest at that time, but merely did so upon our orders.

We believe that in view of the above explanation, you will agree with us that our charge is entirely satisfactory.

Yours very truly, Dalzell Towing Company, Inc.
—— ——, Treasurer.

LHD—G.
Encl.

[fol. 94] RESPONDENT'S EXHIBIT J

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SUN OIL COMPANY, Libelant,

against

DALZELL TOWING COMPANY, INC., Respondent; Steamtugs "Dalzellite", "W. F. Dalzell", and "Fred B. Dalzell, Jr."; Fred B. Dalzell, Claimant

It is hereby stipulated and agreed between Sun Oil Company, libelant, and Dalzell Towing Company, Inc., respondent, and Fred B. Dalzell, claimant, by their respective proctors, for the purposes of the trial of this suit, that on May 15, 1925, Archibald J. Fulton, Jr., a civil engineer attached to the United States Army Engineers at New York, in the performance of his official duties as such engineer, boarded the S. S. Sabine Sun while she was lying aground in the

vicinity of Bergen Point, New Jersey, for the purpose of locating her position. At 4:00 P. M. on said date said engineer, Archibald J. Fulton, Jr., from the stem of the Sabine Sun, took a number of sextant angles of shore stations used [fol. 95] by the United States Army Engineers and entered them, together with other data which he observed, in a report which he made to the District Engineer, a true copy of which report consisting of two pages is hereto annexed.

Dated New York, January 28th, 1930.

Duncan & Mount, Proctors for Sun Oil Company.
Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Dalzell Towing Company, Inc., and for Fred B. Dalzell.

May 15, 1925.

Subject: Grounding of SS. Sabine Sun

To the District Engineer:

The tanker Sabine Sun owned by Sun Oil Co. loaded with petroleum and bound for Texas dock, Bayonne, N. J., ran aground in Newark Bay vicinity of Bergen Point light at 3:28 P. M. this date.

Ship at time of grounding was drawing 24'.0 even keel and the tide was 4.8. Hull was pierced by rock at forward tank starboard side at a point 69' aft of stem.

Cargo was pumped from Sabine Sun into tank barges of Texas Oil Co. and ship floated and proceeded to Texas dock at 7:00 P. M.

Sextant angles taken at stem of ship were:

Sextant Angles Taken at Stem of SS. Sabine Sun, 4:00 P. M. May 15, 1925

[fol. 96] Zero on Sta. Laboratory observe Station Linseed ..... 37°—07'
Zero on Station Linseed observe Station Varnish, 1925 ..... 43°—47'
Zero on Station Varnish, 1925, observe Station T. & D. ..... 74°—28'
Zero on Station T. & D. observe Station Shooters ..... 25°—27'
Course or direction of ship:
Zero on Bergen Point Light observe center line of ship, i. e. stack ..... 108°—18'

A. J. Fulton, Jr.

[fol. 97] STIPULATION AS TO RESPONDENT'S EXHIBIT K

[Title omitted]

It is hereby stipulated and agreed by and between the proctors for the respective parties hereto, that the following exhibit need not be printed in the record on appeal herein, and may be produced and used on the argument of the appeal as though printed in the apostles; Exhibit K—Blueprint chart of Kill von Kull.

Dated New York, June 30, 1931.

Duncan & Mount, Proctors for Libelant. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Respondent and Claimant.

[fol. 98] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

KNOX, D. J.:

The trial of this suit developed the following state of facts:

On May 15, 1925, the steamship Sabine Sun, laden with oil, was off Stapleton, Staten Island. She was desirous of delivering the cargo at the dock of Texas Oil Company, at Bergen Point, New Jersey. On the preceding day, Leopold A. Turnbull, Assistant Marine Superintendent of Sun Oil Company, in the ordinary course of his duties, had telephoned to respondent, and requested that tugs be sent to the Sabine Sun to take her to Bergen Point. Realizing that the waters leading to that destination were shallow at certain points, the libelant's representatives told respondent that the vessel would be lightered so as to bring her [fol. 99] draft to twenty-four feet. When this had been done, the tug W. F. Dalzell proceeded alongside the steamer. The tug captain went upon the steamer's bridge to act as pilot. The tanker, using her own steam, accompanied by the tug, got under way. When the vessels were opposite St. George, they were joined by the tug Dalzellite. The three boats then proceeded through the Kill von Kull,

and off Port Richmond, the tug Fred B. Dalzell, Jr., became a part of the flotilla. Her Master, Howard B. Fort, ascended the bridge of the Sabin Sun to assume the role of pilot, relieving Captain Bennett of the W. F. Dalzell, who, nevertheless, remained on board. Turnbull, the captain of the tanker, his third officer, and a quartermaster were also there. The weather was clear, the tide was within an hour of high water, and the wind was such that it played no part in subsequent events.

In passing, it should be observed that Fort, in order to equip himself with knowledge of conditions existing along the channel through which the steamer was to go, and which was in process of being dredged, and which was also unmarked with the usual aids to navigation, had visited the locality on the previous day, and taken soundings of the depths of water through which the steamer was to move. He had also communicated with the engineers of the War Department, in an endeavor to procure a blue print of the work then in progress. This he secured. He also bought a copy of the latest chart of the waters. These aids, it is said, were not of a character to furnism him with accurate knowledge of what he might expect to find. As a result, [fol. 100] Fort was apprehensive of his ability to get the vessel to her destination in safety. In fact, he states that he explained the difficulties of the situation to Turnbull, and that had the latter not remarked that he would "take the risks", and would be very much pleased if the job were executed as well as when it was last performed, he, (Fort) would have returned the ship to anchorage. Turnbull denies that any such conversation occurred. Whatever may be the truth as to this feature of the case, the tanker, using her own steam, with a tug on either quarter, and one forward on the port side, proceeded on her way. In navigating the vessel, Fort took his ranges from a gas tank and a street end on Staten Island that he had used successfully on former occasions when taking vessels into Newark Bay. On this trip, however, as he was rounding about Bergen Point, on an angle of 90 degrees to starboard, the forward part of the Sabine Sun struck against some obstruction, and went fast aground. She so remained for about three hours, during which time she was lightened of a part of her cargo. When this had been accomplished, the vessel floated and, under the pilotage of

Captain Fountain, who was brought aboard, was taken to her dock. The grounding of the vessel injured some of her plates, and this suit is designed to recover the resultant damages.

Captain Fountain testifies that when he went on board the steamer, she was out of the channel and I so find. When Fountain took charge and the steamer had been floated, he backed her into the Kill von Kull, and then maneuvered in such fashion that the turn in the channel, which Fort had apparently missed, was made without trouble. On [fol. 101] reaching the dock of the Texas Oil Company, Fountain returned the vessel to Fort, who warped her into the berth.

Upon the facts as they have been recited, it is clear that libelant can have no recovery against the tugs, or any of them. None of them contributed to the accident in any way, shape or form. For this reason, each of them must be exonerated. The Edward G. Murray, 278 Fed. 895.

But, as for the respondent's part in the occurrence, somewhat different considerations must receive attention.

The first of these is that the representative of the owners of libelant, paid, or rather gave, the sum of fifteen dollars to Fort upon the completion of his work in handling the vessel. This payment, I think, should be regarded as a mere gratuity, and in no way determinative of the question of respondent's liability in the premises. See The Edward G. Murray, supra, and The Procida, 243 Fed. 251.

So far as the conversation, in which Fort says that Turnbull assumed the risks incident to the navigation of the Sabine Sun, is concerned, I am of the belief that it should not, granting that it took place, affect the question of liability. There is an element of the case that renders Fort's disclaimer of responsibility, if he actually made it, more or less academic. It is that respondent's engagement with respect to the Sabine Sun was qualified by a clause appearing upon its rate sheet, and bills for services, which reads as follows:

"When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use [fol. 102] of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain

or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

Copies of respondent's "Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.", containing the above quoted clause, were forwarded to libelant's office on November 15, 1923, December 28, 1923 and June 10, 1924, in response to inquiries concerning towage charges. One of such copies was received by Mr. Innis, a clerk in libelant's office; another by the office manager of libelant's marine office; and a third by Mr. Turnbull himself. In a letter which accompanied the rate schedule which was sent to libelant and received by Innis, the respondent said:

"We are attaching herewith a towage schedule and would like to call your attention to the last paragraph marked with an 'X'."

This reference was to the pilotage clause set out above.

Respondent usually handled the vessels of libelant in this port, and inasmuch as the pilotage clause is printed on the bills for services rendered by respondent, to say [fol. 103] nothing of the attention which was drawn to the clause by respondent's letter, there can be no doubt that libelant should be charged with knowledge of the terms on which respondent offered to furnish towing services. So far as appears, libelant never informed respondent that it would not accept towage services on the terms proposed, as was the fact in McWilliams Bros., Inc. vs. Davis, Director General, 285 Fed. 312. Nor was the existence of the pilotage clause only brought to the attention of a superannuated and inactive employee of the respondent, as was done in G. Robitzek & Bro., Inc. vs. Davis, Director General, 296 Fed. 107. On the contrary, the responsible officials had every opportunity to know of the limitation contained in the terms of respondent's offer to undertake engagements such as it assumed for libelant. While Turnbull denies that he had ever actually read the clause prior

to the trial, he does admit that he had "heard of it". The facts here present bring the case within the rule of law as announced by the Circuit Court of Appeals in this circuit in The Oceanica, 170 Fed. 893; in Ten Eyck vs. Director General, 267 Fed. 974, and in The Cutchogue, 10 Fed. (2d) 671, to the effect that under circumstances such as those now before me, the tow assumed the risk of injury. The principle of these cases must here be recognized. Appreciation is had, of course, of the circumstance that the law of this circuit on the question now before me is not in harmony with that followed by the Appellate Courts of several other circuits, and may indeed be in conflict with the pronouncement of the Supreme Court in The Syracuse, 12 Wall. 167. It is true, nevertheless, that the latter court [fol. 104] refused to review the Ten Eyck case, supra, and there is nothing which indicates that the Appellate Court of the Circuit is inclined to change its previous rulings on the question. Until that change be made, I shall follow the law as it has been here repeatedly declared. As for the contention that the Supreme Court cited its decision in The Syracuse as a basis of its conclusion in The Wash Grey case, 277 U. S. 66, it needs only to be remarked that the facts recently before the court in that litigation are easily and fundamentally distinguishable from those in the case at Bar.

From what has been said, it would seem as though libelant cannot escape the binding effect of the decisions of the local Circuit Court of Appeals, to which reference has been made, even though it be assumed that Fort was guilty of negligence in getting the Sabine Sun out of the channel and on to the ground. By reason of my conclusion, I need make no finding on the question of Fort's negligence.

The libels are dismissed.

November 25th, 1930.

—— ——, U. S. D. J.

[fol. 105] In United States District Court

[Title omitted]

Order of Findings and Conclusions

Counsel for the respective parties herein being unable to agree on the facts of this case, and I having specially found

the facts necessary to a decision of the case and stated such findings in my opinion herein, and I having separately stated in said opinion my conclusions of law on the facts so found,

Now, therefore, I do hereby order:

1. That the opinion filed herein on November 25, 1930, be, and it hereby is made, my findings of fact and conclusions of law in this case, and that it be entered of record as and for such findings and conclusions.

2. That said findings and conclusions constitute the formal decision in this case, and a final decree in accordance therewith may be entered herein on proper notice to the proctors for the libelant.

Dated New York, February 5th, 1931.

Jno. C. Knox, U. S. D. J.

[fol. 106] In United States District Court

[Title omitted]

Final Decree—Feb. 17, 1931

The above entitled cause having duly come on to be heard on the pleadings and proofs adduced by the respective parties and having been argued by advocates for the respective parties and due deliberation having been had thereon and the Court having made its findings of facts and conclu-
[fol. 107] sions of law and filed its opinion in writing, dated November 25, 1930, dismissing the libel with costs and the costs of the respondent having been duly taxed at $58.21 and the costs of the claimant having been duly taxed at $276.21,

Now, on motion of Burlingham, Veeder, Fearey, Clark & Hupper, proctors for respondent and claimant herein, it is

Ordered, adjudged and decreed that the libel herein be, and the same hereby is, dismissed as against respondent, Dalzell Towing Company, Inc., with costs; and it is further

Ordered, adjudged and decreed that the libel herein be, and the same hereby is, dismissed as against the steamtugs

"Dalzellite", "W. F. Dalzell" and "Fred B. Dalzell, Jr.", with costs; and it is further

Ordered, adjudged and decreed that the respondent, Dalzell Towing Company, Inc., recover of and from the libelant, Sun Oil Company, and/or its stipulators the sum of $58.21, costs as taxed with interest from the date of entry of this decree until paid and that respondent have execution therefor; and it is further

Ordered, adjudged and decreed that the claimant, Fred B. Dalzell, recover of and from libelant, Sun Oil Company, and/or its stipulators the sum of $276.21, costs as taxed with interest from the date of entry of this decree until paid and that claimant have execution therefor; and it is further

[fol. 108] Ordered that unless an appeal be taken from this decree within ten (10) days after the service of a copy thereof with notice of entry upon the proctors for the libelant, the libelant and/or the stipulators for costs on the part of the libelant do cause the engagements of their respective stipulations to be performed, execution may issue against the goods, chattels, lands and tenements and other real estate to enforce satisfaction of this decree.

William Bondy, U. S. D. J.

[fol. 109] In United States District Court

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the libelant, Sun Oil Company, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from so much of the final decree, entered herein February 17, 1931, as adjudges and decrees that the libel herein be dismissed as against the respondent, Dalzell Towing Company, Inc., with costs, and that the respondent recover of and from the libelant and its stipulators the respondent's costs as taxed, in the sum of

[fol. 110] Fifty-eight and 21/100 Dollars ($58.21), and that respondent have judgment and execution therefor.

Dated New York, April 20, 1931.

Yours, etc., Duncan & Mount, Proctors for Libelant. Office and P. O. address: 27 William Street, New York City.

To Messrs. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Respondent, 27 William Street, New York City; Charles Weiser, Esq., Clerk.

WOOLSEY:

The above appeal is hereby allowed.

[fol. 111] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR

The libelant Sun Oil Company hereby assigns error in the findings, decision and final decree of the District Court in the following respects:

First. In that the court dismissed the libel as against respondent Dalzell Towing Company, Inc.

Second. In that the court did not grant a decree for the libelant against the respondent Dalzell Towing Company, Inc.

Third. In that the court held that the respondent Dalzell Towing Company, Inc. was not liable for the grounding of the SS. "Sabine Sun" on May 15, 1925.

[fol. 112] Fourth. In that the court held that there was a valid contract between the libelant and the respondent Dalzell Towing Company, Inc., by which it was agreed that respondent would not be liable for any negligence of its tug captain while he was acting as pilot of the SS. "Sabine Sun".

Fifth. In that the court failed to hold that said contract was illegal and void.

Sixth. In that the court, although recognizing the conflict between its decision and that of the United States Supreme Court in The Syracuse, 12 Wall. 167, failed to follow the rule laid down by the Supreme Court.

Seventh. In that the court failed to find that there was no express contract between the libelant and the respondent in regard to the tug captain who went on the SS. "Sabine Sun" as pilot.

Eighth. In that the court held that the libelant should be charged with knowledge that the respondent offered to furnish towage services only on terms which included the pilotage clause.

Ninth. In that the court held that the libelant and SS. "Sabine Sun" assumed the risks of injury during the respondent's towage service.

Tenth. In that the court failed to hold that the respondent's tug captain, who was on board the SS. "Sabine Sun" as pilot, was respondent's servant.

Eleventh. In that the court, although finding that the SS. "Sabine Sun" grounded outside the channel, failed to [fol. 113] find that she grounded through the negligence of respondent's tug captain.

Twelfth. In that the court held that respondent's engagement was qualified by a clause appearing on its bills for service.

Thirteenth. In that the court held that the pilotage clause, appearing on respondent's rate schedule, was a part of the towage contract and was a condition to respondent's offer to tow.

Fourteenth. In that the court held that libelant, by engaging respondent's towage services and allowing respondent's tug captain to go on the "Sabine Sun" as pilot, assumed the risks of the towage.

Dated New York, April 20, 1931.

Duncan & Mount, Proctors for Libelant.

[fol. 114] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the District Court in the above entitled matter as agreed on by the parties.

Dated New York, July 7, 1931.

Duncan & Mount, Proctors for Libelant. Burlingham, Veeder, Fearey, Clark & Hupper, Proctors for Respondent and Claimant.

[fol. 115] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 116] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1931

No. 114

Argued December 23, 1931

Sun Oil Company, Libelant-Appellant,

v.

Dalzell Towing Company, Inc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

Opinion—January 11, 1932

Libel in admiralty by Sun Oil Company against Dalzell Towing Company, Inc., and three tugs owned by it to recover for damages alleged to have been caused to libelant's steamship by negligent towage. From a final decree dis-

missing the libel, the libelant has appealed. Decree affirmed.

Duncan & Mount, of New York City (Frank A. Bull, of New York City, of counsel), for appellant.

Burlingham, Veeder, Fearey, Clark & Hupper, of New York City (Chauncey I. Clark and P. Fearson Shortridge, both of New York City, of counsel), for appellee.

SWAN, Circuit Judge:

In May, 1925, the respondent was employed by the libelant to take its steamship Sabine Sun from Staten Island to Bergen Point, N. J. While proceeding through the Kill von Kull, accompanied by three of respondent's tugs, the captain of one of which was on the bridge of the steamer in the role of pilot and directing her helm and engine movements, the steamer grounded at a point which the District Court found to be outside the channel. To recover the damages thus sustained this suit was brought. The Sabine Sun was proceeding under her own steam, and the tugs were exonerated because none of them contributed in any way to the grounding. The appellant has assigned no error to the dismissal of the libel as to them. The respondent also was exonerated, on the ground that its contract of employment put the risk of the tug captain's alleged negligence (assuming that he was negligent) upon the tow. This ruling the appellant vigorously attacks. Two questions are presented: (1) Whether the contract did contain a provision putting the risk on the tow; and (2), if it did, whether such a provision is valid.

The contract was oral, and, as is usual in towage cases, consisted merely of an order telephoned by the tow owner and accepted by the tug owner, so that the full terms of the contract must be spelled out by the court from the previous dealings of the parties. On May 14, 1925, Mr. Turnbull, the assistant marine superintendent of Sun Oil Company, called the office of Dalzell Towing Company by telephone, and requested that on the following day they take the Sabine Sun from Stapleton to the dock of the Texas Oil Company at Bergen Point. The respondent's agent replied that they would be ready to take her about 1:30 p. m. That was all of the conversation. Nothing was said about pilot-

age, but Mr. Turnbull understood that his vessel would move under her own steam and that one of the tugboat captains would come upon her bridge and take charge as pilot. The parties had previously done business together, and on three prior occasions the respondent had mailed to the libelant a printed document entitled, "Pro Forma Towage Rates and Contract with Dalzell Towing Company," which contained a final paragraph reading as follows:

[fol. 117] "Pilotage

"When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

This had been sent to libelant's Philadelphia office on November 15, 1923, with a letter calling special attention to the pilotage clause. A second copy was sent to libelant's office at Marcus Hook, Pa., on December 28, 1923, and a third copy was again sent to that office on June 10, 1924. In letters accompanying the two copies last mentioned, reference was made by respondent to its schedule of towage rates, and it was asserted that bills which were being questioned by the libelant were in accordance therewith. The correspondence of June, 1924, was with Mr. Turnbull himself, who admitted that he had before him at the time a bill of respondent upon the face of which is printed the pilotage clause. Another bill bearing the same clause was also put in evidence, and Mr. Turnbull testified that he saw such bills "right along" and had "heard of" the pilotage clause, although he denied that he had ever actually read it until asked to do so at the trial. Whether he had actually read the clause and whether it was in his mind when he telephoned the order for tugs for the Sabine Sun is quite

beside the point. The meeting of the minds of the parties to a contract is not determined by a subjective test. Mr. Turnbull's offer on behalf of the libelant, which the respondent accepted, must be interpreted in the sense in which the party using the words should reasonably apprehend that they would be understood by the other party. 2 Williston, Contracts, § 605. Knowing that the respondent had a schedule of rates and a pilotage clause, the importance of which had been stressed not only in the letter of November 15, 1923, but also by printing it on its billheads, the libelant should reasonably apprehend that its telephone order for tugs would be understood by respondent as a request that they be furnished upon its customary terms as to rates and pilotage. The court below rightly held that the contract between the parties included the pilotage clause as one of its terms. See Ten Eyck v. Director General, 267 F. 974 (C. C. A. 2); The Cutchogue, 10 F. (2d) 671 (C. C. A. 2); Graves v. Davis, 235 N. Y. 315, 139 N. E. 280. Cases relied upon by the appellant are distinguishable, for in them the tug owner's notice was not shown to have been received by any responsible agent of the owner of the tow. See McWilliams Bros. v. Davis, 285 F. 312 (C. C. A. 2); G. Robitzek & Bros. v. Davis, 296 F. 107 (C. C. A. 2); Calzavaro v. Planet S. S. Corp., 31 F. (2d) 885 (C. C. A. 4).

The appellant argues that, even if the pilotage clause was a term of its contract with respondent, the case at bar was not brought within it, but the argument is wholly without merit. It is mentioned merely to indicate that it has not been overlooked.

We pass to the contention that the pilotage clause is invalid in so far as it attempts to put upon the tow the risk of the tug captain's negligence while acting as pilot of the vessel as she proceeded under her own power. The authorities relied upon are a statement of Mr. Justice Davis in The Syracuse, 12 Wall. 167, 171, 20 L. Ed. 382, and a recent decision by the late Chief Justice Taft in which that language was repeated. Compania de Navegacion v. Fireman's Fund Ins. Co., 277 U. S. 66, 73, 48 S. Ct. 459, 72 L. Ed. 787 (for convenience hereafter referred to as The Wash Gray). After an elaborate consideration of the question, this court decided that an agreement by the tow to

assume all risks was effectual to release the tug from liability for its negligence, because a tug is not a common carrier in its relation to the tow. The Oceanica (C. C. A.) 170 F. 893. Judge Ward's comments on the meaning of Mr. Justice Davis' statement in The Syracuse, and the reasons advanced for thinking it not controlling upon this court need not be here repeated. The authorities have been collected and ably discussed in the Pacific Maru, 8 F. (2d) 166 (D. C. S. D. Ga.). Many have reaffirmed the rule laid down in The Oceanica, and it has become so firmly established in this circuit and rests, as it seems to us, upon reasoning so sound, that we should not think of departing from it unless the later Supreme Court case clearly demands it. That question, however, is not now presented, [fol. 118] for the decision in The Wash Gray is clearly distinguishable, in our opinion, from the case at bar.

The Wash Gray did not involve a pilotage clause. It was a case in which a steamship contracted to tow a tugboat (The Wash Gray) from Tampico to Galveston under a contract which provided that the steamer "is not responsible in any way for loss or damage to" the tow. The tow was lost at sea, and in a suit against her hull underwriters a defense was interposed that the release of the towing vessel, undisclosed to the underwriters, vitiated the insurance. In holding that it did not, Chief Justice Taft said that the contract did not release the towing vessel from liability for negligence of its master or crew, and quoted from The Syracuse. Whether the opinion he read as meaning that the contract as drawn should be construed as not intended to embrace negligence (as the appellee contends) or as meaning that a contract which attempts to release a towing vessel from liability for negligence is invalid (as the appellant contends), it does not, upon either alternative, control decision of the problem before us. If the opinion lays down only a rule of construction, it is too clear for argument that it does not apply to the pilotage clause in suit which indubitably expresses the intention to put upon the "assisted vessel" the risk of the pilot's handling of her. If, on the contrary, the opinion lays down the rule that a towing vessel cannot release herself from liability for negligence, however clearly that intention be expressed in the contract of towage, a distinction may well be taken between a towage con-

tract as such and a pilotage contract. When a tug owner is engaged in towing a dead vessel, he may limit his liability to the value of his tug. It is conceivable (although we should not so decide unless constrained by controlling authority) that, having granted the privilege of limited liability, the law forbids a towing company from gaining complete exemption from liability if the tug is at fault. But when the "assisted vessel" is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot. [The Sarnia, 261 F. 900 (C. C. A. 2)] and no limitation of liability of the tug owner. We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: "I will furnish a man believed to be competent but you must assume the risk of his errors." If this cannot be done, the piloting company may readily be wiped out by a single disaster. Believing that The Wash Gray opinion does not preclude a decision that the pilotage clause in question is valid, we affirm the holding of the District Court to that effect. This makes it unnecessary to consider whether or not Captain Fort was in fact negligent in stranding the vessel.

Decree affirmed.

[fols. 119 & 120] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

DECREE—Jan. 18, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 121] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 122] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 23, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

APR 14 1932

Supreme Court of the United States

OCTOBER TERM, 1931—No. 374 38

SUN OIL COMPANY,

Petitioner,

against

DALZELL TOWING COMPANY, INC.,

Respondent.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

RUSSELL T. MOUNT,
Counsel for Petitioner.

CORPORATE PRESS, INC., New York City

Supreme Court of the United States

OCTOBER TERM, 1931—NO.....

SUN OIL COMPANY,
Petitioner,
against
DALZELL TOWING COMPANY, INC.,
Respondent.

Sirs:

PLEASE TAKE NOTICE that upon the certified copy of the record herein and upon the annexed petition and brief for petitioner, copies of which are herewith served upon you, I shall apply to the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on the 16th day of May, 1932, at the opening of court, or as soon thereafter as counsel can be heard, for a writ of certiorari in conformity with the prayer of said petition, and for such other relief as may be just.

Dated, New York, April 14, 1932.

Yours, etc.,

RUSSELL T. MOUNT,
Proctor for Petitioner.

To:

MESSRS. BURLINGHAM, VEEDER, FEARY CLARK & HUPPER,
Proctors for Respondent,
27 William Street,
New York City.

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Supreme Court of the United States

OCTOBER TERM, 1931—No.....

SUN OIL COMPANY,
Petitioner,
against
DALZELL TOWING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI

The petition of Sun Oil Company respectfully shows to this Honorable Court as follows:

A.

Summary Statement of the Matter Involved.

This is a petition by Sun Oil Company, owner of the tank steamer *Sabine Sun,* for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decision of that Court (R., p. 121), which affirmed a final decree in admiralty of the United States District Court for the Southern District of New York (R., 106-8) dismissing the petitioner's libel as against the respondent Dalzell Towing Company, Inc.

The suit was brought against respondent and three steam tugs to recover damages resulting from negligent towage (R., 2-6), but no error was assigned to the dismissal of the libel as to the three tugs (R., 109-13). The dismissal as to the respondent was based entirely on a pilotage clause in respondent's schedule of rates (R., 103-4, 118, 120).

The facts of the case are, briefly, as follows:

Petitioner is a New Jersey corporation, with its principal office in Philadelphia (R., 21). Respondent is a corporation engaged in towing in and about New York Harbor (R., 7, 82) and operating, among others, the tugs involved in this case (R., 75-6).

In November and December, 1923, and in June, 1924 (R., 80-1, 89, 92-3), respondent mailed schedules of its "pro forma" towing rates to employees of Sun Oil Company (petitioner) in response to their inquiries about towing rates and charges for past services (R., 79, 88, 90). These schedules contained, at the end and after the rates, a clause reading as follows:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or characterers shall be liable for any damage resulting therefrom" (R. 86).

On May 14, 1925, a year or so after receipt of these schedules, petitioner orally requested respondent *to take the S. S. Sabine Sun from Stapleton, Staten Island, to Bayonne, New Jersey, and respondent agreed* (R., 22-3). Nothing was said by either about pilotage (R., 38), but it was expected that respondent would furnish a competent pilot for the movement (R., 34, 38-9).

The following day one of respondent's tugs met the *Sabine Sun,* and the captain of the tug went on the ship's

bridge, without any request from petitioner (R., 23), and directed the steamer and the tug as far as Port Richmond (R., 23, 58), another of respondent's tugs joining them in the interim (R., 23-4). Off Port Richmond respondent's third tug joined them, and her captain, without petitioner's previous knowledge or request (R., 24), went on the steamer's bridge and took over the pilotage (R., 24, 41, 53, 54), the first tug captain remaining on the bridge nevertheless (R., 59, 60, 54). This was all in accordance with instructions from respondent (R., 54, 58).

This second tug captain testified that respondent ordered him to get the master of the *Sabine Sun* to assume responsibility for whatever might happen during the movement (R., 55); that, when he went on the steamer, he took it up with petitioner's assistant marine superintendent (R., 44-5, 54); and that, if this man had not agreed to assume the risks, he (the tug captain) would have taken the steamer back to anchorage pursuant to respondent's orders to him (R., 46, 55). The assistant marine superintendent denied such a promise on his part (R., 73), and it would be without consideration and not binding on petitioner in any event. This was not held to constitute a binding contract by the District Court (R., 101), and the Circuit Court of Appeals did not mention it.

While going up into Newark Bay with two of respondent's tugs on the steamer's port side and one on her starboard (R., 44), and respondent's second tug captain in complete charge and directing the maneuvers by giving the orders to the tugs and to the men at the steamer's wheel and telegraph (R., 27, 41, 44, 57), the *Sabine Sun* went hard aground (R., 24, 46, 9) out of the channel (R., 64, 100) and sustained considerable damage (R., 25).

While the vessel was stranded, respondent's tug captain in charge asked the captain of an outside tug to come

on the bridge of the *Sabine Sun* and assist him (R., 65). This outside tug captain took charge, and, after the vessel was pulled back into deep water, he took her through the waters that respondent's tug captain should have followed, and she arrived at her destination without further incident.

While respondent was undertaking to move the *Sabine Sun* from Stapleton to Bayonne the weather was fair and clear with little or no wind, and the tide was right for the movement (R., 41). There was no claim of fault on the part of the ship (R., 77-8), and the tugs obeyed all the commands of the tug captain in charge (R., 57). Although respondent claimed that this was a dangerous place for navigation because of the possibility of meeting other tows and dredges, there was no evidence that anything interfered with the navigation, and respondent's tug captain admitted that he directed the tugs and ship, by shore ranges adopted by him, to the point of stranding (R., 47, 48).

District Court Opinion.

The District Court, whose opinion is reported in 48 F. (2d) 598 (R., 98-104), found that respondent's tug captain grounded the *Sabine Sun* out of the channel (R., 100), but held that respondent would not be liable for any negligence of its tug captain and that there was no need of a finding on the question of his negligence (R., 104).

It denied a recovery to the petitioner on the ground that the pilotage clause in respondent's rate schedule was a part of the towage contract between petitioner and respondent (R., 101). It did not decide whether respondent's second tug captain to go on the *Sabine Sun* was petitioner's servant, and the evidence showed that, in fact, he was under respondent's orders and therefore was re-

spondent's servant rather than petitioner's (R., 55). The whole basis of the decision was that, regardless of the agency, the contract was one by which petitioner, or the tow, "assumed the risk of injury" (R., 103), the court saying:

> "The facts here present bring the case within the rule of law as announced by the Circuit Court of Appeals in this Circuit in *The Oceanica,* 170 Fed. 893; in *Ten Eyck* v. *Director General,* 267 Fed. 974, and in *The Cutchogue,* 10 F. (2) 671, to the effect that under circumstances such as those now before me, the tow assumed the risk of injury. The principle of these cases must here be recognized. Appreciation is had, of course, of the circumstances that the law of this Circuit on the question now before me is not in harmony with that followed by the Appellate Courts of several other Circuits, and may indeed be in conflict with the pronouncement of the Supreme Court in *The Syracuse,* 12 Wall. 167. * * *
>
> From what has been said, it would seem as though libelant cannot escape the binding effect of the decisions of the local Circuit Court of Appeals, to which reference has been made, even though it be assumed that Fort was guilty of negligence in getting the *Sabine Sun* out of the channel and onto the ground" (R., 103-4).

CIRCUIT COURT OF APPEALS OPINION.

The Circuit Court of Appeals, whose opinion is reported in 55 F. (2d) 63 (R., 116-20), likewise refused to pass on the question of the tug captain's negligence (R., 120) because it held that the pilotage clause was a part of the towage contract between the parties (R., 118) and barred any recovery by petitioner for the tug captain's negligence (R., 120). The court also followed its prior

decisions, holding a contract to tow at the risk of the tow invalid and ineffective to release the tower from liability for its own negligence, rather than the decisions of this court in *The Steamer Syracuse,* 12 Wall. 167, 171, and *Compania de Navigacion* v. *Firemen's Fund Ins. Co.,* 277 U. S. 63, 73-4. It said:

> "We pass to the contention that the pilotage clause is invalid in so far as it attempts to put upon the tow the risk of the tug captain's negligence while acting as pilot of the vessel as she proceeded under her own power. * * * After an elaborate consideration of the question, this court decided that an agreement by the tow to assume all risks was affectual to release the tug from liability for its negligence, because a tug is not a common carrier in its relation to the tow. *The Oceanica* (C. C. A.), 170 Fed. 893. Judge WARD'S comments on the meaning of Mr. Justice DAVIS' statement in *The Syracuse,* and the reasons advanced for thinking it not controlling upon this court need not be here repeated" (R., 119).

It further suggested that the pilotage clause might accomplish that purpose even if the older owner's risk clauses, such as were involved in the cases in this court, could not (R., 120).

The Circuit Court of Appeals decision appears to have been largely influenced by the court's fear, as expressed in its opinion, that if a towing company cannot relieve itself from liability for negligence it "may readily be wiped out by a single disaster" (R., 120). No such danger is apparent in this case and, in any event, the question presented is not whether a towing company *can* avoid liability for its tug captains' negligence by some proper arrangement, but whether respondent *did* relieve itself from liability for the stranding of the *Sabine Sun* by the

negligent acts of its own servant in the performance of respondent's contract to tow or transport. In *The Syracuse, supra,* referred to in both opinions below, this court held that a towing company cannot relieve itself from liability for negligence by a contract to tow at the risk of the tow, and that is all that is sought by the pilotage clause, where, as in this case, respondent keeps its tug captains under its own control, so that their negligence is respondent's negligence.

B.

Reasons Relied on for the Allowance of the Writ.

1. The decision below is in direct conflict with the decisions of this court in *The Steamer Syracuse, supra,* and in *Compania de Navigacion* v. *Firemen's Fund Ins. Co., supra.*

2. The decision below is in direct conflict with the decisions of the Circuit Courts of Appeals for the Fourth and Ninth Circuits, as well as with the decisions in the district courts of those circuits and in the district courts sitting in Maine, Florida, and the Northern District of Ohio.

3. The decision below failed to give effect to the legal status of the tug captains as respondent's servants while they were in charge of the movement of the ship pursuant to respondent's contract.

The case involves questions of the maritime law of great importance to shipowners whose business requires their vessels to enter ports on all coasts of the country and in different federal judicial circuits where the maritime law should be uniformly construed and applied. Until the uniform maritime law is uniformly applied, the chaos

resulting from the present conflicting opinions will continue.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of appeals for the Second Circuit, commanding that court to certify and send to this court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 114, Sun Oil Company *v.* Dalzell Towing Company, Inc., and that the decree of the United States Circuit Court of Appeals for the Second Circuit in this case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may seem just; and your petitioner will ever pray.

SUN OIL COMPANY,
By RUSSELL T. MOUNT,
Counsel for Petitioner.

I HEREBY CERTIFY that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this court, and that it is not filed for the purpose of delay.

RUSSELL T. MOUNT,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931—No.....

SUN OIL COMPANY,
Petitioner,
against
DALZELL TOWING COMPANY, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below.

The opinion of the United States District Court for the Southern District of New York (R., 98-104) was rendered under date of November 25, 1930, and is reported in 48 F. (2d) 598.

The opinion of the United States Circuit Court of Appeals for the Second Circuit (R., 116-20) was rendered on January 11, 1932, and is reported in 55 F. (2d) 63.

II.

Jurisdiction.

1. The date of the judgment entered herein by the United States Circuit Court of Appeals for the Second Circuit affirming the decree of the District Court, is January 18, 1932 (R., 121).

2. This is a proceeding within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

3. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, U. S. Code Title 28, Section 347, and under Article 3, Section 2, of the Constitution of the United States.

III.

Statement of the Case.

Inasmuch as a statement of the case necessarily has been given under heading "A" in the petition, a restatement is omitted here in the interest of brevity.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following respects:

1. In holding that respondent relieved itself of liability, and petitioner assumed all risks of respondent's handling the S. S. *Sabine Sun*.

2. In holding that the pilotage clause in respondent's rate schedule constituted a valid contract relieving respondent of any liability to petitioner.

3. In holding that the pilotage clause covered negligence of respondent's tug captain while on the *Sabine Sun*.

4. In holding, in effect, that the pilotage clause made respondent's tug captain petitioner's servant, irrespective of the facts in evidence.

V.

Argument.

Summary of Argument.

The pilotage clause printed on respondent's schedule of "pro forma" towage rates refers to any vessel under steam, and purports (1) to make the captain of any tug, used in the movement of a vessel, the servant of the vessel while he is on her directing either the movements of the tugs or the vessel, and (2) to relieve the towing company from liability for any damage resulting from its tug captains' direction of the tugs or vessel. The lower courts held that the second of these purported stipulations relieved respondent from liability for the negligence of its tug captain on the *Sabine Sun,* following prior cases in the Second Circuit which are in direct conflict with the decisions of this court and with those in other circuits.

Petitioner's position is that the pilotage clause, even assuming that it was part of the contract between respondent and petitioner in this instance, would not relieve respondent of liability for the damage to the *Sabine Sun* caused solely by the negligence of its tug captain in charge of the vessel's movement, for the following reasons:

1. A contract to tow or transport a vessel without liability for negligence is invalid as a matter of law. As this court has said, the law requires of those engaged in the management of towing vessels "the exercise of reasonable care, caution and maritime skill."

2. The clause does not cover negligent acts in respondent's performance of its contract to take a vessel from one berth to another. Exemption from liability for negligence

should not be read into it because that would be inconsistent with the legal obligation under the contract to use reasonable care.

3. The tug captain who stranded the *Sabine Sun* was not, in fact or in law, the servant of petitioner. He was selected, employed, paid and controlled by respondent; was engaged in performing respondent's work; and never was transferred to the control of petitioner. He could not be petitioner's servant because he was serving respondent as master.

In short, such a contract would not relieve respondent, an independent contractor, from liability for damages resulting from the negligent acts of its own servant.

FIRST POINT.

A contract to tow at the risk of the tow and without liability of the tug owner has been held by this Court and by other circuits to be invalid and ineffectual to relieve the tug owner from liability for the negligence of his servants.

The pilotage clause provides that "neither those furnishing the tugs and/or pilot, nor the tugs * * * shall be liable for any damage resulting" from "the giving of orders to any of the tugs furnished" or "the handling of" the steamer by respondent's tug captain who is on the steamer (R., 86). That provision is the same as one that the *Sabine Sun* would be moved by respondent without liability on its part for any damage. Nowhere is negligence mentioned in the clause.

Of similar clauses for towing at the risk of the tow, this Court said:

> "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

The Steamer Syracuse (1870), 12 Wall. 167, 171; *Compania de Navigacion* v. *Firemen's Fund Insurance Co.* (1928), 277 U. S. 66, 73-4.

In *Compania de Navigacion* v. *Firemen's Fund Insurance Co., supra* (for convenience, hereafter referred to as *"The Wash Gray"*), this court also said of such a contract by the owner of the SS. *Freeport,* which was towing the tug *Wash Gray:*

> "It did not release the Freeport from any loss or damage to the Wash Gray due to the negligence of the master or crew of the towing vessel" (p. 73).

The Steamer Syracuse, supra, was consistently followed by all the federal courts until 1909. *The M. J. Cummings* (1883, N. D. N. Y.), 18 Fed. 178; *The American Eagle* (1893, D. C. Ohio), 54 Fed. 110; *The Jonty Jenks* (1893, N. D. N. Y.), 54 Fed. 1021, 1023; *The Somers N. Smith* (1903, D. C. Me.), 120 Fed. 569, 576; *In re Moran* (1903, E. D. N. Y.), 120 Fed. 556, 558; *Alaska Commercial Co.* v. *Williams* (1904 C. C. A. 9 C.), 128 Fed. 362, 366; *The Edmund L. Levy* (1904 C. C. A. 2 C.), 128 Fed. 683,

684; *The Oceanica* (1906 W. D. N. Y.), 144 Fed. 301, 305.

On appeal in *The Oceanica, supra,* the Circuit Court of Appeals for the Second Circuit, by a divided court, reversed the District Court decree, refusing to follow *The Steamer Syracuse. The Oceanica,* 170 Fed. 893. On a rehearing of that appeal the court admitted that it was departing from the law as previously decided by itself and by this court (p. 900).

After *The Oceanica* appeal the courts in the Second Circuit followed its new statement of the law, but *The Steamer Syracuse* was followed in the other circuits. *The Monarch* (1916 D. C. Fla.), 235 Fed. 795; *Mylroie* v. *British Columbia Mills Tug & Barge Co.* (1920 C. C. A. 9 C.), 268 Fed. 449; *The Sea Lion* (1926 D. C. Cal.), 12 F. (2d) 124; *United States* v. *Norfolk-Berkley Bridge Corp. et al.* (1928 E. D. Va.) 29 F. (2d) 115, 118; *Calzavaro* v. *Planet S. S. Corp. et al.* (1929 C. C. A. 4 C.) 31 F. (2d) 885.

Most of the subsequent cases in the Second Circuit involved contracts specifically exempting the towing company from liability for negligence (*Ten Eyck* v. *Director General of Railroads,* 267 Fed. 974); but the courts of that circuit have refused to follow this court, and have applied the same rule even in the cases where negligence was not mentioned. The only case in a federal court outside of the Second Circuit that has upheld such a contract is *The Pacific Maru* (1925 D. C. Ga.), 8 F. (2d) 166, but in that case also the contract *expressly covered negligence.* The District Court of Florida (in the same circuit), however, followed *The Steamer Syracuse. The Monarch, supra.*

The New York Court of Appeals also held a similar contract *expressly covering negligence* to be valid (*Graves* v. *Davis,* 235 N. Y. 315), but the New York courts, up to that time, had always held that even common carriers

might contract against negligence. That New York rule was not changed until the decision in *Straus & Co.* v. *Canadian Pacific Ry. Co.* (1930), 254 N. Y. 407.

The situation at present is that there is a direct conflict in the federal courts, but the preponderance of the rule laid down by this court is shown by the following table:

Where held invalid	*Where held valid*
Supreme Court	Second Circuit
First Circuit	Fifth " (Ga.)
Fourth "	
Fifth " (Fla.)	
Sixth "	
Ninth "	

Such contracts were also held invalid in the Second Circuit before the decision, by a divided court, in *The Oceanica, supra.*

It is true that, notwithstanding they were contrary to the decision of this court in *The Steamer Syracuse,* certiorari was refused in *The Oceanica, supra* (215 U. S. 599), and in *Ten Eyck* v. *Director General, supra,* (254 U. S. 646); but this court has repeatedly pointed out that such a denial does not mean that it approved the law laid down by the lower court. *U. S.* v. *Carver,* 260 U. S. 482, 490.

It has been pointed out that *Ten Eyck* v. *Director General, supra,* differed from *The Oceanica* and *The Steamer Syracuse,* in that the contract there involved *expressly covered negligence.* It may be that this court would sustain the validity of the *Ten Eyck* clause on that account, but in view of the decisions in *The Steamer Syracuse* and *The Wash Gray,* it clearly could not agree with *The Oceanica* decree nor with the decision against the *Sabine Sun.* The clause applied against the petitioner did not

specify negligence, and exemption from liability for negligence should not be read into it in favor of its author, the respondent.

In *British Columbia Mills Tug & Barge Co.* v. *Mylroie*, 259 U. S. 1, the towing contract contained a clause as follows:

> "That the Tug will render to the Barge 'Bangor' reasonable assistance from time to time in any emergency which might arise, and while discharging at Anchorage the Tug is to be within call of the Barge at all times to render such reasonable assistance in case of any emergency that might arise. The Tug Company is not to be held liable for any damage which might happen to the said Barge 'Bangor' or its cargo while in tow or at anchor" (p. 11).

This court found it unnecessary to pass upon the validity of the last sentence of that clause, which sought to exempt the towing company from liability for damage to the tow, because it held that the clause *did not cover negligence* of the towing company's tugs or servants. It held that an exemption from liability for negligence would be inconsistent with the contract to take all reasonable means to successfully tow the barge, and that therefore the clause should be read as though it provided that the towing company would not be liable unless it failed to take all reasonable means against injury to the tow.

In the case at bar the petitioner requested the respondent *to take* the *Sabine Sun* to Bayonne, and the respondent agreed. This would amount to a contract to furnish tugs and crew, with a competent man in charge, to use reasonable care to move the vessel. The Circuit Court of Appeals, however, held that that contract for reasonable care also included the pilotage clause, which attempted a similar

exemption from liability to that in the last sentence of the clause quoted above from the *Mylroie* case. The same reasoning that this court applied in the *Mylroie* case would require a construction of the alleged contract between petitioner and respondent to mean that the respondent would not be liable for damage resulting from the giving of orders to the tugs or from the handling of the steamer by respondent's tug captain in charge, *unless respondent's tug captain in charge failed to use reasonable care in directing the tugs and steamer.* The District Court and Circuit Court of Appeals, however, did not apply the same rule, but read into the contract an exemption from liability for any negligence of respondent's tug captain, no matter how gross.

The Circuit Court of Appeals also said that *The Wash Gray, supra,* is distinguishable from the case at bar, but we submit that the proposition of law involved is the same. *Calzavaro* v. *Planet S. S. Corp. et al, supra,* 31 F. (2d) 885. After agreeing with *The Oceanica* in its attempt to overrule *The Steamer Syracuse,* and stating that *The Wash Gray* is distinguishable, the court treated the contract before it as merely one to supply a pilot to a navigating vessel (R., 120). Such a construction is not justified, because the contract was *to "take" the Sabine Sun to Bayonne,* and the pilotage was merely an incident to respondent's contract to take complete charge of the movement.

Respondent's tug captain directed both the steamer and respondent's tugs, and went on the steamer's bridge merely for his own convenience in watching the course to be taken by him and in directing the tugs and steamer. *The Procida* (1917 S. D. N. Y.), 243 Fed. 251. His mere going on the steamer did not make him petitioner's servant, and we will show that he remained respondent's servant and under respondent's orders.

SECOND POINT.

The tug captain who stranded the *Sabine Sun* was not petitioner's servant.

The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun* pursuant to respondent's contract. They started out as employees of an independent contractor, and there was no change in their status unless through the pilotage clause provision that "When the captain of any tug furnished * * * goes on board said vessel * * * it is understood and agreed that said tugboat captain * * * becomes the servant of the owners of the vessel * * *" (R., 86).

They both went onto the *Sabine Sun* under respondent's orders (R., 54) and without consulting, or being requested by, petitioner (R., 23, 24, 27). Petitioner had no contract with either of them, did not choose them, and gave them no orders or instructions. Indeed, the second tug captain, who stranded the steamer, was ordered to relieve the first one and remained under respondent's orders while in the very service in which respondent claims he was petitioner's servant (R. 55). He was told to require petitioner to assume respondent's responsibilities or to take the steamer where she was not wanted, in spite of petitioner's wishes; and he intended to serve respondent by taking her back to anchorage if petitioner did not accede to his demands (R., 45-6, 55).

If the pilotage clause made the first captain petitioner's servant, respondent could not take him off and substitute another without petitioner's consent; but respondent did displace him with another (R., 54) without consulting petitioner (R., 24, 27). The power of substitution or discharge is an important element in determining the employment. *Standard Oil Co.* v. *Anderson,* 212 U. S. 215,

225. These men could not remain under respondent's control, allowing respondent's orders to take precedence over any that petitioner could give, and be legally petitioner's servants. They could not be under respondent's orders to force petitioner to assume new obligations or risks, and at the same time be petitioner's employees.

The status of these tug captains is well illustrated by inquiries into their rights and petitioner's responsibilities to them. Would petitioner be liable for damage to their tugs caused by their own negligent orders in compliance with respondent's instructions to them, and contrary to petitioner's wishes or instructions? If either of them was injured, without any fault of petitioner, would petitioner be liable to them for maintenance and cure? Or, could they recover from petitioner, regardless of their contributory negligence, under the Jones Act (Merchant Act, 1920, Sec. 33)? We believe the answer to each of these inquiries must be in the negative; and that because the tug captains were not servants or employees of the shipowner (petitioner).

We fully agree with the Circuit Court of Appeals that a "person who merely supplies a pilot" *can,* by express agreement, exempt itself from liability for the negligence of a competent pilot so supplied to be the agent of the ship piloted (R., 120). But this was not merely a contract to supply a pilot; it was a contract to move a vessel with the aid of tugs, and, although pilotage was not mentioned at the time of making the contract, it was one of the necessary elements of the complete undertaking. We also concede that a person can limit his servants' employment and, by proper definite agreement, lend them to another for certain purposes. The facts of this case, however, contradict or negative a relationship of master and servant between petitioner and respondent's tug captains.

Where a shipowner engages an independent contractor to do work, the contractor cannot send his employee to take charge, subject to his orders and control, and escape liability for the employee's negligent acts merely by calling him the shipowner's servant. In *Standard Oil Co.* v. *Anderson, supra,* this Court said, at page 221:

> "He who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work."

Sternaman v. *Metropolitan Life Ins. Co.,* 170 N. Y. 13, involved an application for insurance containing an agreement that the medical examiner, selected, employed and paid by the insurer, would be the agent of the insured in examing him. The insured had nothing to do with the examination except to submit and answer questions. It was held (p. 22) that, notwithstanding the agreement contained in the application form, "the relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law," the Court saying:

> "As between the examiner and the insured, the relation of principal and agent did not exist, while, as between the examiner and the company, that relation did exist by operation of law, yet it is claimed that as between the insured and the company, the examiner was the agent of the former, only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company, or its president, was his agent. It was in contradiction of every act of the parties and of every fact known to either" (p. 20).

The pilotage clause at bar is not the determining factor of the relationship between petitioner and respondent's tug captain. That relationship must be determined by the selection, the employment, the control, and the work being done. *Standard Oil Co.* v. *Anderson, supra.* For the relationship to exist there must be a master as well as a servant. *Little* v. *Hackett,* 116 U. S. 366. In *McNamara* v. *Leipzig,* 227 N. Y. 291, 294, the court said:

> "The relation of master and servant is created by contract, express or implied. Of the elements which may constitute it, those that the servant must, in the course of the employment, be doing the work of the master under the will, direction and control of the master throughout all the details of the work, are essential."

One cannot serve two masters with conflicting interests. When respondent intentionally kept control, and continued the master of these tug captains, it made it impossible for them to become the servants of petitioner, irrespective of any prior pilotage clause.

If the contract had obligated petitioner to accept, as its servant, any tug captain furnished by respondent, surely it would not obligate petitioner to accept one over whom it had no control and who would not be subject to its orders. It could only require petition to accept a servant in fact. By respondent's own conduct it contradicted and displaced the pilotage clause.

There was evidence that respondent's tug captain received $15 from petitioner (R., 47), and respondent has claimed that this was a payment for his services while on the *Sabine Sun.* This captain was on respondent's payroll, and of course he could not recover from petitioner for negligently stranding the steamer while on her in the performance of respondent's work. The District Court cor-

rectly held that this was a mere gratuity (R., 101). *The Edward G. Murray* (1922 C. C. A. 2 C.), 278 Fed. 895; *The Procida* (1917 S. D. N. Y.), 243 Fed. 251; *The Caspian* (1925 E. D. Pa.), 14 F. (2d) 1006.

Conclusion.

It is respectfully submitted that a writ of certiorari should be granted so that this court may review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the question, and to the end that the maritime law may be uniformly applied in the various circuits, and that the courts of admiralty may be in accord with the authorities of this court.

RUSSELL T. MOUNT,
Counsel for Petitioner.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY,

Petitioner,

against

DALZELL TOWING COMPANY, INC.,

Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

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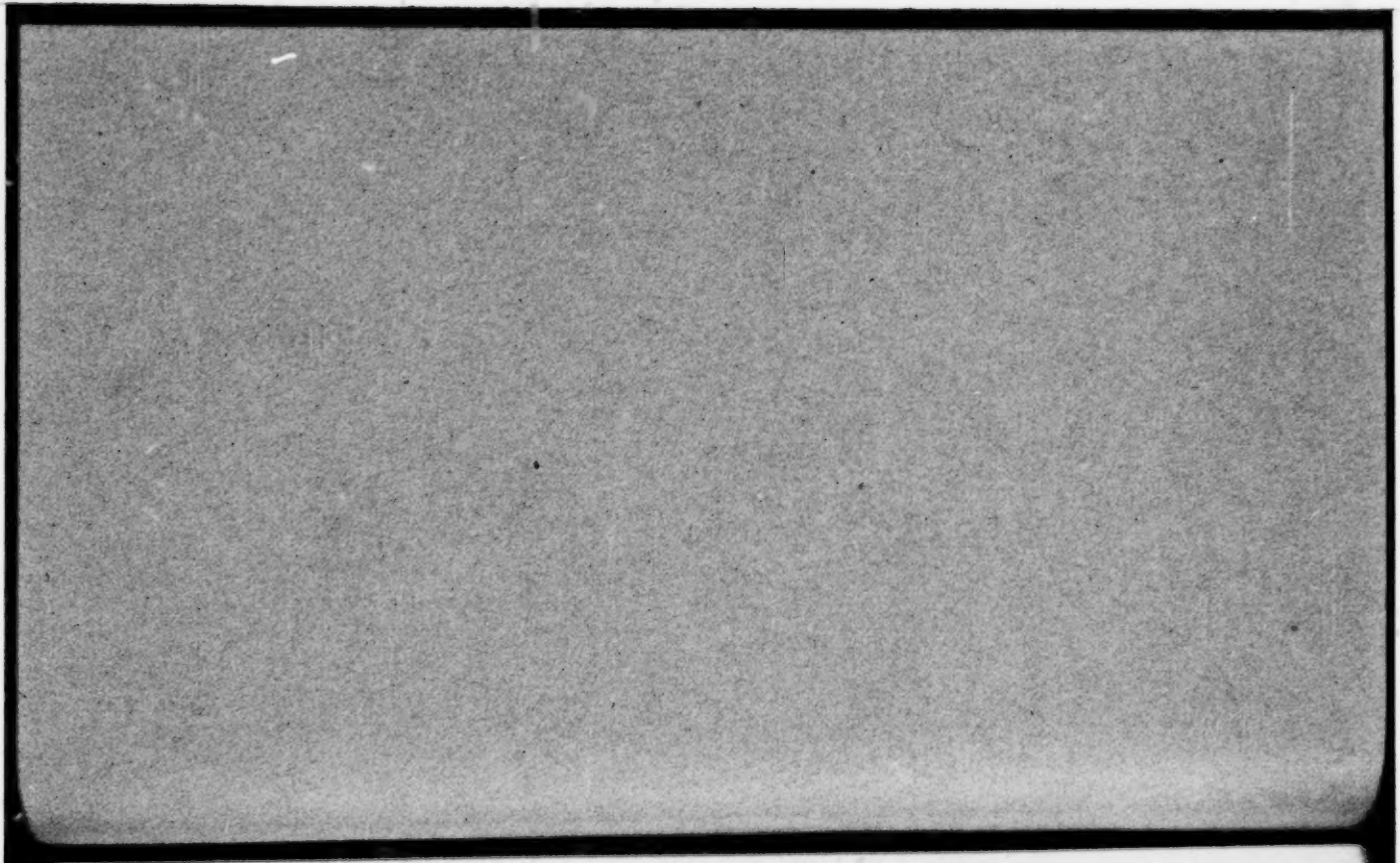

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Supreme Court of the United States

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY,
Petitioner,
against
DALZELL TOWING COMPANY, INC.,
Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

I.

The Opinions of the Courts Below.

This is a review, on writ of certiorari, of a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit.

The opinion of the District Court for the Southern District of New York was rendered on November 25, 1930, and is printed at pages 75-9 of the record. It is reported in 48 F. (2d) 598.

The opinion of the Circuit Court of Appeals for the Second Circuit was rendered on January 11, 1932, and is printed at pages 84-9 of the record. It is reported in 55 F. (2d) 63.

II.

Jurisdiction.

This case is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. The jurisdiction of this Court was invoked by a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit (October Term, 1931, No. 874), which was granted on May 23, 1932 (R. 90). 285 U. S. (Pre. Print) No. 1, page v., 52 Su. Ct. Rep. 640.

III.

Statement of the Case.

The suit was brought against the respondent and three steamtugs operated by respondent to recover damages resulting from negligent towage of petitioner's tank steamer *Sabine Sun* (R. 1-4). The tugs were exonerated (R. 77, 80-1), but no error was assigned to the dismissal of the libel as to them (R. 82-3). The appeal from the District Court decree was directed to the dismissal as against the respondent (R. 81) and the case no longer involves the tugs but is only between petitioner and respondent.

The facts involved in the case are as follows:

Petitioner, a New Jersey corporation with its principal office in Philadelphia, was the owner and operator of the tank steamer *Sabine Sun* (R. 14). Respondent is a corporation engaged in towing in and about New York Harbor (R. 5, 64) and, at the times involved in the litigation, operated, among others, the steamtugs *W. F. Dalzell, Dalzellite* and *Fred B. Dalzell, Jr.* (R. 61).

In November and December, 1923, and in June, 1924 (R. 63-4, 70, 72), respondent mailed schedules of its towing rates

to employees of Sun Oil Company (petitioner) in response to their inquiries about towing rates and charges for past towage services (R. 63, 69, 70). These rate schedules (R. 64-8) were entitled "Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.," and quoted rates for towing, docking and shifting vessels, provisions in regard to holidays, overtime, detention and the supplying of steam by tugs, a schedule of running time between points around New York Harbor, and at the very end a clause with the heading "Pilotage" which stated that any tug captain going on a steamer using her own propelling power would become the servant of the owners of the steamer and that the towing company would not be liable for any damage resulting from his handling of the steamer or tugs. The clause is quoted at page 13 of this brief.

On two bills sent by respondent to petitioner around the same time, in October, 1923, and May, 1924, for towing the *Sabine Sun* and *Delaware Sun,* the same clause appeared in very fine print at the bottom of the bill form (R. 68-9, 71-2).

On May 14, 1925, *a year or so after receipt of these "pro forma" schedules of rates and the two bills for towage services,* petitioner's tank steamer *Sabine Sun* came into New York harbor with a cargo of oil on her way to the Texas Company dock at Bayonne, New Jersey (R. 14-5). Petitioner's assistant marine superintendent, Turnbull (R. 14), had come up from Philadelphia and he arranged to lighter sufficient cargo at Stapleton, Staten Island, to get the vessel's draft down to 24 feet before proceeding up into Newark Bay (R. 18, 75).

On the afternoon of May 14, 1925, Turnbull requested respondent by telephone *to take the Sabine Sun from Stapleton to Bayonne, and respondent agreed* (R. 14-5). Turnbull informed respondent that the vessel would be lightered to a 24-foot draft and ready for the movement to Bayonne on the

following day (R. 14, 75), but nothing was said about the number of tugs to be furnished (R. 15). At the time Turnbull did not know anything about the above pilotage clause in respondent's towage schedule (R. 18-19, 21, 29), and nothing was said about pilotage (R. 29), although it was expected that respondent would furnish a competent man to take charge (R. 25, 29-30).

After the steamer's draft was brought down to 24 feet, on May 15 (R. 18, 75), respondent's tug *W. F. Dalzell* (R. 32) came alongside at Stapleton (R. 15) and her captain, Bennett, went on the steamer's bridge to take charge of the movement (R. 5-6, 15, 47, 75). Neither Turnbull nor the master of the *Sabine Sun* asked Bennett to come on the steamer or to take charge (R. 15-16).

Captain Bennett took over the handling of the steamer and they proceeded toward Kill van Kull (R. 32, 47, 16). The *Sabine Sun* was under steam and Bennett's tug was proceeding with her. When near St. George, Staten Island, respondent's tug *Dalzellite* met them and tied up alongside (R. 15, 75), but her captain did not go onto the steamer (R. 16).

About off Port Richmond, Staten Island, respondent's third tug, the *F. B. Dalzell, Jr.*, joined them (R. 16, 31-2, 42), and her captain, Fort, went on the *Sabine Sun's* bridge to take charge, relieving Captain Bennett (R. 16, 32, 43, 47) who, nevertheless, remained on her bridge (R. 16, 43, 48, 76). Neither Turnbull nor the steamer's master requested Captain Fort to come aboard or to relieve Bennett (R. 16, 19).

Fort had been directed by respondent to take charge of the movement (R. 43, 47), and the day before he had gone down to Newark Bay to find out the depth of the channel (R. 33, 42-3). He thought that "the channel was only good for 24 feet before that," but the Army Engineers were claim-

ing there was 30 feet at that time (R. 45). Although the *Sabine Sun* was only drawing 24 feet (R. 18, 74, 75), and Turnbull had so advised respondent (R. 14-15, 75), Fort said respondent had told him she would draw 25 feet 6 inches (R. 40) and he wanted to verify the Army Engineers' information that the channel was deep enough. He took soundings at low water (R. 45) which showed 26 to 30 feet of water in the channel and 23 to 24 feet outside (R. 43). He was testing the depth of the channel itself (R. 43), and did not sound at the place where he later grounded the *Sabine Sun* (R. 42-3).

Fort testified that he considered these waters rather difficult (R. 33, 42), and, in addition to sounding the channel, he secured information from the Army Engineers regarding the conditions around Bergen Point, including a blueprint and chart (R. 35). Although he obtained these plans as a preliminary precaution, he claimed that he was familiar with the waters (R. 37, 39) and did not need markings or aids to navigation (R. 39, 40).

The time and conditions were right for this movement, the weather fair and clear with little or no wind, and the tide around the last of the flood, about an hour before high water (R. 32). Fort placed the tug *W. F. Dalzell* on the steamer's port bow, the *F. B. Dalzell, Jr.* (his tug) on the steamer's port stern, and the *Dalzellite* on her starboard bow, the latter tug being expected to break any possible shear that might be taken while the steamer and tugs were going up into Newark Bay (R. 34). From the bridge of the *Sabine Sun* he was in complete charge and directed the maneuvers (R. 16, 19, 32, 43), using the ship's engines and giving orders to the tugs and to the men at the wheel and telegraph of the steamer (R. 34, 46).

On reaching the mouth of Newark Bay it was necessary to make a sharp turn to starboard and proceed up a channel

about 500 feet wide (R. 55, Exhibit K) running between Shooters Island, off to the port, and Bergen Point Light to starboard (R. 52). The blue print used by Fort (Exhibit K) shows a 30-foot channel 500 feet wide, the middle of which is about 600 feet from the end of the long pier at Shooters Island. He never took the *Sabine Sun* within 800 feet of that pier (R. 38-9), although he admitted that one should try to keep in the middle of the channel (R. 46).

On turning into Newark Bay, Fort used a street and gas tank on shore as ranges by which to navigate (R. 34, 38), instead of the channel which he had found by sounding (R. 43); and by keeping on these ranges he ran the *Sabine Sun* hard aground (R. 16, 36, 6), a rock piercing her No. 1 starboard tank about 69 feet aft of her stem (R. 17, 74). Captain Fountain, a disinterested expert familiar with those waters, testified that the *Sabine Sun* was out of the channel where she lay aground on this rock (R. 52), and the District Court so found (R. 77).

The *Sabine Sun* remained aground about three hours (R. 29, 6, 76), during which time some of her cargo of oil was lightered from the forward tanks, and some was run back into the after tanks by gravity (R. 17, 18, 6, 76) in order to get her bow up so she would come off the rock. Fort asked the captain of an outside tug, Fountain, to come on the bridge of the steamer and assist him (R. 53). Fountain took charge (R. 54, 76-7), and, after the steamer was pulled back into deep water, he made the turn into Newark Bay and proceeded up the channel, the same waters that Fort should have followed, and she arrived at her destination without further incident (R. 54, 55, 18).

It was on these facts that petitioner sought to recover from respondent and the tugs for the negligent stranding. There was no evidence or claim of anything defective or unusual in the ship, and it was admitted that her master was not at fault (R. 62). The tugs were exonerated because Fort

testified that they obeyed all his orders and did everything required of them (R. 46-7, 77). Respondent's own evidence was that the stranding occurred at a point where its tug captain in charge intentionally took the steamer, that is, on shore ranges purposely adopted by him (R. 36-8, 40).

The District Court and the Circuit Court of Appeals did not pass upon the question of the negligence in stranding the *Sabine Sun,* but both held that the pilotage clause appearing at the end of the rate schedules which were sent by respondent to petitioner in 1923 and in June, 1924, was a part of the contract made by respondent over the telephone in May, 1925, to take the *Sabine Sun* up to Bayonne (R. 77, 87); and, although negligence on the part of respondent's tug captain is not mentioned in that pilotage clause, that it nevertheless barred any recovery by petitioner (R. 79, 89) whether the damage was caused without fault, by negligence, or even wantonly.

IV.

Specification of Errors.

The Court below erred in holding:

(1) That respondent relieved itself of liability, and petitioner assumed all risks of respondent's handling the S.S. *Sabine Sun;*

(2) That there was an express contract regarding pilotage between petitioner and respondent;

(3) That the pilotage clause in respondent's rate schedule constituted, or was part of, a valid contract relieving respondent of any liability to petitioner;

(4) That the pilotage clause, and the contract between the parties, covered negligence of respondent's tug captain while on the *Sabine Sun;*

(5) In effect, that respondent's tug captain was petitioner's servant, irrespective of the facts in evidence; and

(6) In failing to hold that respondent was liable for the negligent stranding of the *Sabine Sun* by its tug captain in charge.

V.

Argument.

Summary of Argument.

This case was decided by the lower courts entirely on the pilotage clause. They declined to pass upon the legal liability of respondent aside from the alleged contract with that clause. The decree below is contrary to the law as decided by this Court and should be reversed for the following reasons:

(1) Respondent contracted *to take the Sabine Sun* from Stapleton to Bayonne, and undertook the movement with three tugs and the captain of one of them in complete charge of both the ship and the tugs. By such an undertaking respondent impliedly agreed to supply capable tugs and a competent and reasonably careful man to take charge, and the law imposed a duty on it not to cause injury to the *Sabine Sun,* either through its tugs, captains, or crews.

(2) The man furnished by respondent to take charge was bound to know the channel, its depth, tides and currents, and how to direct the movement successfully. Respondent, as an independent contractor, would be liable for any damage resulting from his incompetence or negligence.

(3) Respondent's tug captain stranded the *Sabine Sun,* outside the channel, while in the performance of respondent's contract. Taking her outside the channel could be due only

to incompetence or negligence. There was no *vis major,* and there is no proof in the case to overcome the strong legal presumption of negligence.

(4) The pilotage clause in respondent's rate schedule, sent to petitioner about a year before, was not a part of the contract *to take* the *Sabine Sun* to Bayonne; and, in any event, a contract to tow or take a vessel without liability would not cover negligence. If it were intended to exempt from liability for negligence, it would be invalid as a matter of law.

(5) Even if the pilotage clause was a part of the towage contract, the tug captain in charge was not, in fact or in law, a servant of petitioner. His conduct, and respondent's, contradicted such a relationship and displaced the pilotage clause. He was selected, employed, paid and controlled by respondent, and was respondent's servant engaged in performing respondent's work.

(6) The case should be decided on the evidence of the unexplained stranding outside the channel, and on the law which imposes upon a towing company the duty not to cause injury to the vessel which it has contracted to transport from one place to another.

As the courts below held that there was a contract which relieved respondent of the liability imposed by law for negligence, and therefore did not pass on the points raised in paragraphs 1, 2 and 3 above, we will first direct our argument to the existence and effect of the contract claimed; and, as this is a trial *de novo* in admiralty, we will then discuss the law which should have been applied.

FIRST POINT.

There was no express contract with respect to respondent's liability for negligence.

In view of the decision (under review) that the parties contracted that respondent would not be liable for damage resulting from its tug captain's handling of the *Sabine Sun* and the tugs, it is first necessary to inquire whether there was in fact such a contract. The evidence which is claimed to spell out an agreement to that effect does not indicate any meeting of the minds of the contracting parties.

Respondent does not deny that it was an independent contractor as to the tugs, but it claims that a different relationship existed between petitioner and its tug captain, Fort,—the supervisor of the entire towage service. There was no contract between petitioner and Fort, but respondent seeks to create one out of the pilotage clause (R. 67-8) appearing in the rate schedules and bills sent to petitioner's employees eleven months and more before the towage service was engaged.

Two bills sent in October, 1923, and May, 1924, were for past services (R. 68-9, 71), and of course did not constitute any part of a future contract.

The schedule was primarily a statement of the then current rates for towage. It was sent to petitioner's employees in response to their letters inquiring about charges made (R. 63, 69, 70-1), and in the letters of transmittal it was referred to as a "towage schedule" or "tariff rates." It was not in the form of a contract, nor even of an offer.

This schedule was entitled "Pro Forma Towage Rates and Contract." It is not a contract in itself, and its author did not advise those to whom it was sent that it was an offer. We do not know why respondent chose to make the docu-

ment *pro forma,* but it would seem likely that it was intended that respondent could not be bound by it. If a shipowner, after receipt of one of these schedules, should obtain towage services and insist on paying at the rates stated therein, respondent could justifiably say that the schedule was only "pro forma" and the rates stated not binding on it.

The most that this schedule could be considered is a quotation, or bid for offers; but, if treated as a bid for offers, the pilotage clause would not be a part of a subsequent offer from the person to whom the quotation was made, unless the schedule gave notice that the rates stated were subject to, or conditioned on, that clause. But there was no such notice in this schedule, and the offer to engage tugs in May, 1925, was not at the rates quoted for 1923 and 1924,—unless they happened to be the then current rates for such service.

In many of the cases where courts have found a contract with a similar towage condition, it was clear that the owner of the tow was notified that service would be supplied *only on the condition.* Express notice was given that, from then on, towage would be furnished only on the understanding that the towing company would not be responsible for negligence. *Ten Eyck* v. *Director General* (1920 C. C. A. 2), 267 Fed. 974; *Graves* v. *Davis* (1923), 235 N. Y. 315; *The Cutchogue* (1926 C. C. A. 2), 10 F. (2d) 671.

Here there was no such notice, and the words *"pro forma"* in the title of the document preclude the clause being held out as a necessary condition.

Clearly, the schedule was not an offer as petitioner had no right, of acceptance or otherwise, based upon its receipt. *The "pro forma" rates negative any offer.* There is no evidence that the schedules sent in 1923 and 1924 were in effect in 1925, nor that the charge made for this service was at the 1923 or 1924 rates (R. 21). Petitioner's use of the schedules

was in checking the charges on past towage bills. They were not sent as offers for future business.

Even if this schedule had not been merely *pro forma,* but had been intended as an offer, we submit that it should not be construed as a part of a contract made a year after, without both parties having it in mind. Turnbull had no knowledge that the clause was a condition of his engagement of the tugs (R. 18). He could not have constructive knowledge without notice that it would be a condition, or that it was the only terms on which respondent would furnish tugs. A meeting of the minds, either actual or in contemplation of the law, is necessary to the creation of a contract; and to support its affirmative defense, respondent had the burden of proving this necessary element of a contract.

To hold that there was a meeting of the minds is to contradict the evidence. We see no reason why petitioner should be required to remember this clause, *which was never stated as a condition of the towage,* when respondent, the party for whose benefit it is claimed, could easily have made it a true condition of the contract at the time the services were engaged. To make such a contract for its own benefit, respondent should be required to give notice in definite terms, not merely by an ambiguous *pro forma* document. Respondent should not be allowed to avoid duties the law imposes on it by such equivocation.

SECOND POINT.

The contract claimed would not relieve respondent from liability for its tug captain's negligence.

The pilotage clause in respondent's *pro forma* schedule (R. 67-8) is as follows:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

For the purpose of this point, we will assume that respondent contracted to take the *Sabine Sun* up to Bayonne on the understanding that it, as the one "furnishing the tugs and/or pilot," would not be liable for any damage resulting "from the giving of orders to any of the tugs" or from "the handling of" the steamer by the tug captain-pilot on the steamer's bridge. It is our interpretation of the pilotage clause that it only purports to relieve respondent of liability if and when the tug captain-pilot is the servant of the steamer, but the Circuit Court of Appeals held that it has the same effect regardless of whose servant he may be and we will first direct our argument to the alleged contract as so construed. The question of agency will be reserved for our next point.

Of contracts to tow at the risk of the tow this court said in *The Steamer Syracuse* (1870), 12 Wall. 167, 171:

> "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on a towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

This language was approved, and the principal reiterated in *The Wash Gray* (*Compania de Navigacion* v. *Firemen's Fund Ins. Co.*) (1928), 277 U. S. 66, 73-4.

The law as laid down in *The Steamer Syracuse* was consistently followed and applied in all circuits until 1909. *The M. J. Cummings* (1883 N. D. N. Y.), 18 Fed. 178; *The American Eagle* (1893 D. C. Ohio), 54 Fed. 1010; *The Jonty Jenks* (1893 N. D. N. Y.), 54 Fed. 1021, 1023; *The Somers N. Smith* (1903 D. C. Me.), 120 Fed. 569, 576; *In re Moran* (1903 E. D. N. Y.), 120 Fed. 556, 558; *Alaska Commercial Co.* v. *Williams* (1904 C. C. A. 9), 128 Fed. 362, 366; *The Edmund L. Levy* (1904 C. C. A. 2), 128 Fed. 683, 684; *The Oceanica* (1906 W. D. N. Y.), 144 Fed. 301, 305.

In *The Oceanica, supra,* the District Court said of the *Syracuse* holding, "This principle of maritime law remains unimpeached"; but on appeal the Circuit Court of Appeals for the Second Circuit did impeach the principle and reversed the District Court, by a divided court, refusing to follow *The Syracuse. The Oceanica,* 170 Fed. 893. It tried to distinguish *The Syracuse* and treated the above quotation as mere

dictum, but confessed the futility of this attempt by saying, "Still, it must be admitted that the learned judge was speaking of a special agreement entered into between the tug and the tow that the latter should be towed at her own risk."

On rehearing, the majority gave up attempts to distinguish, saying:

> "We do appreciate keenly that the decision of the majority of the court as to the right of the tug to contract against her own negligence is a departure from previous decisions." Page 900.

After *The Oceanica* appeal the courts in the second circuit followed its new statement of the law; but *The Syracuse* was followed in the other circuits. The *Monarch* (1916 N. D. Fla.), 235 Fed. 795; *Mylroie* v. *British Columbia Mills Tug & Barge Co.* (1920 C. C. A. 9), 268 Fed. 449; *The Sea Lion* (1926 N. D. Cal.), 12 F. (2d) 124; *U. S.* v. *Norfolk-Berkeley Bridge Corp. et al.* (1928 E. D. Va.), 29 F. (2d) 115, 118; *Calzavaro* v. *Planet S. S. Corp. et al.* (1929 C. C. A. 4), 31 F. (2d) 885; *The Vim* (1930 D. C. R. I.), 40 F. (2d) 638.

The leading case in the second circuit since *The Oceanica* is *Ten Eyck* v. *Director General of Railroads* (1920), 267 Fed. 974, which has been followed there in many other cases where the courts refused to apply the rule of *The Syracuse* or to follow the adjudications in other circuits. The only decision outside the second circuit that has followed the *Ten Eck* case is *The Pacific Maru* (1925), 8 F. (2d) 166, where the clause *expressly covered negligence* and where the District Court in Georgia took the position that the quoted language from *The Syracuse* was dictum. The District Court sitting in Florida (the same circuit), however, followed *The Syracuse*. *The Monarch, supra.*

Most of the cases in the second circuit since *The Oceanica* involved contracts specifically exempting the towing com-

pany from liability for negligence (as in *Ten Eyck* v. *Director General, supra*), but the courts of that circuit have refused to follow this Court, and have applied the same rule in cases where negligence was not mentioned.

The Court of Appeals of the State of New York also held a similar contract *expressly covering negligence* to be valid (*Graves* v. *Davis,* 235 N. Y. 315), but the New York courts, up to that time, had always held that even common carriers might contract against negligence. That New York rule was not changed until the decision in *Straus & Co.* v. *Canadian Pac. Ry. Co.* (1930), 254 N. Y. 407.

The situation at present is that there is a direct conflict in the federal courts, but the preponderance of the rule laid down by this Court is shown by the following table:

Where Held Invalid.	*Where Held Valid.*
U. S. Supreme Court.	
First Circuit.	Second Circuit.
Fourth Circuit.	Fifth Circuit (Georgia).
Fifth Circuit (Florida).	
Sixth Circuit.	
Ninth Circuit.	

Such contracts were also held invalid in the second circuit before the decision, by a divided court, in *The Oceanica, supra.*

Certiorari was refused in *The Oceanica, supra,* (215 U. S. 599), and in *Ten Eyck* v. *Director General, supra,* (254 U. S. 646), notwithstanding they were contrary to the decision in *The Syracuse;* but this Court has repeatedly pointed out that such a denial does not mean that it approved the law laid down by the lower court. *United States* v. *Carver* (1923), 260 U. S. 482, 490.

When the Circuit Court of Appeals for the Second Circuit undertook, in *The Oceanica,* to overrule the principle of law

stated in *The Syracuse, supra,* Judge WARD said, *"The Syracuse* has never been cited on this point in any subsequent case in the Supreme Court arising out of a towage contract"; but this Court has now cited the case on the very point, and, contrary to Judge WARD'S opinion, has said that it meant exactly what it previously said in *The Syracuse.* This Court's reiteration of the legal principle, in *The Wash Gray* (*Compania de Navigacion* v. *Firemen's Fund Ins. Co.*), 277 U. S. 66, 73-4, has been recognized as settling the conflict in *U. S.* v. *Norfolk-Berkley Bridge Corp., supra.* A different argument from that of Judge WARD is necessary if the rule of *The Oceanica* is to be upheld.

The fact that respondent was not a common carrier in relation to the *Sabine Sun* does not keep it without the pale of public policy. Its liability does not depend on its contract, but is imposed by law. *The Edmund L. Levy, supra,* page 684. Liability for the tort should not be allowed to be destroyed by an extortionary contract which (if it is extended to cover negligence) attempts to allow recklessness and a wanton disregard of the safety of property entrusted to the towing company. As Circuit Judge COXE said in the dissenting opinion in *The Oceanica:*

> "The wisdom of the rule cannot be doubted. It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, carelessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it. I can see no reason for abrogating the rule and every reason why it should be continued." Page 896.

Whether or not public policy would prohibit a towing company contracting against liability for its own or its servants' fault, it should prevent reading into its contract such an exemption where negligence is not expressly covered.

It has been pointed out that *Ten Eyck* v. *Director General, supra,* differed from *The Oceanica* and *The Syracuse* in that the contract there involved *expressly covered negligence.* It may be that this Court would sustain the validity of the *Ten Eyck* contract on that account, but in view of the decision in *The Syracuse* and *The Wash Gray,* it clearly could not agree with *The Oceanica* decree nor with the decision against the *Sabine Sun.* The clause applied against the petitioner did not specify negligence, and exemption from liability for negligence should not be read into it in favor of its author, the respondent.

In *British Columbia Mills Tug & Barge Co.* v. *Mylroie* (1921), 259 U. S. 1, the towing contract contained a clause as follows:

> "That the Tug will render to the Barge 'Bangor' reasonable assistance from time to time in any emergency which might arise, and while discharging at Anchorage the Tug is to be within call of the Barge at all times to render such reasonable assistance in case of any emergency that might arise. The Tug Company is not to be held liable for any damage which might happen to the said barge 'Bangor' or its cargo while in tow or at anchor." Page 11.

This Court found it unnecessary to pass upon the validity of the last sentence of that clause, which sought exemption from liability, because it held that the clause *did not cover negligence* of the towing company's tugs or servants. It held that exemption from liability for negligence would be inconsistent with the contract to take all reasonable means to successfully tow the barge, and that therefore the clause

should be read as though it provided that the towing company would not be liable unless it failed to take all reasonable means agains injury to the tow.

In the case at bar respondent agreed, at petitioner's request, *to take* the *Sabine Sun* to Bayonne. This constituted a contract to furnish tugs and crews, with a competent man in charge, to use reasonable care to move the vessel. It is what both this Court and the Circuit Court of Appeals for the Second Circuit have classified as a towage service. *Sacramento Nav. Co.* v. *Salz* (1927), 273 U. S. 326, 328; *The Mercer* (1924 C. C. A. 2), 297 Fed. 981, 984. Here, however, it was held that that contract for reasonable care also included the pilotage clause. But applying the reasoning of this Court in the *Mylroie* case, the alleged contract between petitioner and respondent was that respondent would not be liable for damage resulting from the giving of orders to the tugs or from the handling of the steamer by respondent's tug captain in charge, *unless he failed to use reasonable care in directing the tugs and steamer.* The courts below did not apply the same rule, but read into the contract an exemption from the liability imposed by law for any negligence of respondent's tug captain, no matter how gross.

In any towage service *the law imposes* on the towing company or tugs the duty to exercise reasonable skill and care, through its representatives in charge, in the performance of the work. *The Margaret* (1876), 94 U. S. 494, 497. A suit for negligent towage is *ex delicto* and not *ex contractu. The John G. Stevens* (1897), 170 U. S. 113, 124-5.

The contract claimed here differs only in its wording from the "owner's risk" contracts involved in *The Syracuse* and *The Wash Gray.* That their legal effect is the same, was recognized by the Circuit Court of Appeals for the Fourth Circuit in *Calzavaro* v. *Planet S. S. Corp. et al., supra.* The District Court and the Circuit Court of Appeals in following

the overruled *Oceanica,* said that *The Wash Gray* was distinguishable, but we submit that the proposition of law is the same. The distinction is merely in the facts and the wording of the contracts. Both contracts were for services by a towing company which sought to escape all liability for negligence.

In the *Wash Gray* case the *Freeport Sulphur No. 1* undertook to tow the *Wash Gray* under an agreement that the *Freeport* would not be "responsible in any way for loss or damage to the *Wash Gray.*" After her loss through negligence of the *Freeport,* the owner of the *Wash Gray* sued her underwriters, who set up the defense that their policies prohibited any agreement by the insured vessel lessening or destroying her right of recovery against any other vessel, and consequently the underwriters' right of subrogation. This Court held that the defense was without merit because the owners of the *Wash Gray* would have a valid claim against the *Freeport* for any damage caused by the *negligence* of her captain or crew, notwithstanding the contract that the *Freeport* would not be responsible *in any way* for loss or damage. In passing on the contract this Court quoted with approval from the *Syracuse,* and said:

> "It did not release the *Freeport* from any loss or damage to the *Wash Gray due to the negligence* of the master or crew of the towing vessel." Page 37. (Italics ours.)

If a contract that the towing vessel "is not responsible *in any way*" does not cover negligence, how could one merely providing that the towing company would not "be liable for any damage resulting" from the handling of steamer or tugs by the towing company's tug captain in charge? Certainly, the inclusion of the words "in any way" in the *Wash Gray* contract would not make it less comprehensive than the alleged *Sabine Sun* contract.

After agreeing with *The Oceanica* in its attempt to overrule *The Syracuse,* and stating that *The Wash Gray* is distinguishable, the Circuit Court of Appeals treated the respondent's agreement as merely one to supply a pilot to a navigating vessel (R. 89). Such a construction is not justified, because the agreement was *to take the Sabine Sun to Bayonne,* and the pilotage was merely an incident to the contract to transport. It was necessary for respondent to pilot the vessel if it was to take her there. It is unwarranted distortion to ignore the real contract "to take" and consider only the pilotage clause, which, in any case, could only be *a part* of the towage contract. Respondent's tug captain directed both the steamer and the tugs.

In the courts below, and in its brief in opposition to certiorari, respondent argued that its contract was not one of towage but one of pilotage. The service was none the less towage merely because the steamer's engines and steering apparatus were operated by her crew *in the way they were told by the tug captain in charge of tugs and steamer.* Having contracted *to take* the steamer from point to point, it was respondent, acting through its tug captain, who was "making use of her propelling power." Petitioner did not insist on her engines being used.

In *Sacramento Nav. Co.* v. *Salz, supra,* this Court stated the following clear definition:

> "Towage service is the employment of one vessel to expedite the voyage of another." Page 328.

In *The Mercer, supra,* the Circuit Court of Appeals for the Second Circuit said:

> "Towage service is * * * aid rendered in the movement of vessels not in distress, * * *." Page 984.

The *Sabine Sun* was not in distress, but respondent was engaged to expedite her voyage.

Respondent's counsel has argued that respondent did not supply towage to the *Sabine Sun,* but its tugs merely assisted her to navigate. Her "navigation" was by respondent's tug captain, and the tugs were likewise directed by him. It was not a case of separate direction of tugs and steamer; but Fort directed both as separate parts of the flotilla. Counsel claims that any time a towing company moves a vessel under steam, she is merely assisted, but it is as reasonable, and we think more logical, to consider the steamer's engines as assisting the towing company which contracts to move her. *The Georgia* (1927 W. D. N. Y.), 31 F. (2d) 759, 760, aff'd 31 F. (2d) 761. In referring to the *Sabine Sun,* Fort said, "We were using her engines" (R. 34), a recognition that the steamer was being used to assist respondent.

It is interesting to note that respondent itself considered this as a towage service,—until, in litigation, its counsel persuaded it otherwise. In respondent's bill of October 16, 1923 (R. 68-9), a similar service to the *Sabine Sun* was charged for as "Towing from Pier 2 Tide Water Docks, Bayonne to Staten Island (Light, Steam)"; and on May 9, 1924, respondent moved the S.S. *Delaware Sun, under steam,* and billed petitioner for "Towing from East side Pier 5, Constable Hook to Staten Island" (R. 71). If respondent does not know the claimed difference, how can petitioner be expected to know that what respondent calls "towing" is really "assisting"?

Respondent has cited cases in its earlier briefs for the propositions that a towed vessel not under steam has a maritime lien on a tug for negligence of the tug's captain in charge, but that a vessel whose propelling power is used together with tugs has no lien on the tugs for errors of the captain of one of them who is supervising the movement from the steamer's bridge. These cases are used by respondent to support the fallacious argument that the maritime lien against the tugs depends on whether the vessel receiving the

towage service is under steam. But for the fact that the Circuit Court of Appeals appears to have accepted this argument (R. 89), we should consider it unworthy of consideration here.

The true distinction in the cases cited by respondent is in the person or thing negligent. Where the tug captain is on his tug, his negligence in her operation is, in legal contemplation, the negligence of the tug. A tug, being an inanimate thing, cannot be negligent except through its owner (unseaworthiness) or some person on, or in charge of, it. In admiralty, however, any vessel is considered negligent if those on her are negligent (*The Barnstable* (1901), 181 U. S. 464, 467-8); and that negligence by legal fiction creates a maritime lien when it causes damage to others.

The fiction of negligence on the part of the inanimate tug does not extend to make her negligent where the actual negligence is that of someone not on or in charge of her,—except, of course, in cases of unseaworthiness. Where a tug (those operating her) obeys all orders of a person on another vessel, it is not liable *in rem* unless the orders are so clearly wrong that those operating the tug must be charged with notice and therefore negligent in obeying. In this case the tugs obeyed all of Fort's orders (R. 46-7), and therefore could not be held liable *in rem*. It was because the evidence indicated that they obeyed *apparently reasonable* orders from Fort that no appeal was taken as to them.

The Sarnia (1919 C. C. A. 2), 261 Fed. 900, cited below by respondent, and by the Circuit Court of Appeals in its opinion (R. 89), does not support the distinction which respondent contends for. There, as here, the tug obeyed the orders of the tug captain who was on the bridge of a vessel under steam, and was not herself at fault. The District Court held the tug and steamer both liable, but the Circuit Court of Appeals found that the collision was due to the failure of the steamer's engine crew to obey orders from the bridge, and

therefore held the steamer solely at fault. In the present case there is no evidence of a failure of the engines or steering apparatus of the *Sabine Sun*.

Respondent's argument might have some weight if our claim were against the tugs, but the claim in this Court is only against respondent; and respondent is liable whether its negligent tug captain was on a tug, on a vessel under steam, or on a vessel without steam. Respondent's liability is not based on any maritime lien. It should be sufficient answer to this argument that we are only claiming a right *in personam*. If the *Sabine Sun* had been without steam, and Fort had piloted from her bridge without using her engines or steering apparatus, there would not be any maritime lien against any of respondent's tugs, but there would have been the same liability *in personam* of respondent.

THIRD POINT.

The tug captain who stranded the *Sabine Sun* was respondent's servant.

The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun*. They started out as employees of an independent contractor (*Sturgis* v. *Boyer et al.*, 24 How. 110, 123), and there was no change in their status unless through the pilotage clause provision that "When the captain of any tug furnished * * * goes on board said vessel * * * it is understood and agreed that said tug boat captain * * * becomes the servant of the owners of the vessel * * *" (R. 67-8).

They both went onto the *Sabine Sun* under respondent's orders (R. 43) and without consulting, or being requested by, petitioner (R. 16, 19). *Petitioner had no contract with either of them,* did not choose them, and gave them no orders or instructions. Indeed, the second tug captain, who

stranded the steamer, was ordered by respondent to relieve the first one (R. 43), and remained under respondent's orders, and intended to serve respondent (R. 36), while in the very service in which it is claimed he was petitioner's servant (R. 44).

Bennett, respondent's first tug captain to go on the steamer's bridge, was "in charge of the maneuver" (R. 47) until he was relieved by Fort (R. 43). Fort testified that respondent "told me * * * that the ship was bound in, and for me *to take charge of it*" (R. 43), and "I got *orders* to go aboard the ship" (R. 44). The ship had been under way with two tugs for some time when Fort took charge intending not to complete respondent's undertaking but to "take the ship back to anchorage" unless those on her would assume all risks (R. 36). As Fort himself put it, "These are my orders" (R. 44). He was accepting his orders from respondent, instead of from petitioner, at the time when we are asked to believe he had no authority from, or connection with, respondent.

If the pilotage clause made Bennett petitioner's servant, he could not be taken off and another substituted without petitioner's consent; but respondent did displace him with Fort (R. 43) without consulting petitioner (R. 16, 19). The power of substitution or discharge is an important element in determining the employment. *Standard Oil Co.* v. *Anderson* (1909), 212 U. S. 215, 225. These men could not remain under respondent's control, allowing respondent's order to take precedence over any that petitioner could give, and be legally petitioner's servants. They could not be under respondent's orders and at the same time be petitioner's employees.

The master of the *Sabine Sun* did not contribute to the stranding (R. 62), and her crew did nothing except carry out Fort's instructions,—they were merely used by him. *Wilmington Ry. Bridge Co.* v. *Franco-Ottoman S. Co.* (1919

C. C. A. 4), 259 Fed. 166, 171. There was no claim of unseaworthiness against the steamer. As this court said in *Sturgis* v. *Boyer, supra,* at page 125:

> "Without repeating the testimony, it will be sufficient to say, that it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction, and management, of both vessels, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that anyone belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises."

The status of these men is well illustrated by inquiries into their rights and petitioner's responsibility to them. Would petitioner be liable for damage to their own tugs caused by their negligent orders in compliance with respondent's instruction to them, and contrary to petitioner's wishes or instructions? If either of them was injured, without any fault of petitioner, would petitioner be liable to them for maintenance and cure? Or, could they recover from petitioner, regardless of their contributory negligence, under the Jones Act (Merchant Marine Act, 1920, §33)? The answer to each of these inquiries must be in the negative; because the tug captains were not servants or employees of the shipowner (petitioner).

We concede that one can lend his servants so that they become servants of another in particular work done *for and under the direction of such other,* but Fort was working under the direction of respondent, and as this Court said in *Singer Mfg. Co.* v. *Rahn* (1889), 132 U. S. 518:

> "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as

> the result to be accomplished, or, in other words, 'not only what shall be done, but how it shall be done.'" Page 523.

The transporting of the *Sabine Sun* was not done under petitioner's direction, but respondent retained, or at least exercised, the right "to direct the manner in which" it should be done. Fort admitted that he did not submit to petitioner's direction, but, on the contrary and pursuant to respondent's instructions, himself told petitioner what he would do and how he would do it.

We agree with the Circuit Court of Appeals that "a person who merely supplies a pilot" *can,* by express agreement, exempt himself from liability for the negligence of a competent pilot so supplied to be the agent of the ship piloted (R. 89). But this was not merely a contract to supply a pilot; it was a contract to move a vessel with the aid of tugs, and pilotage was one of the necessary elements of the complete undertaking. By its engagement to take the *Sabine Sun* to Bayonne respondent not only promised to furnish tugs, but "also promised to furnish some one who would tell all the tugs (and the steamer) what to do." *The Edward G. Murray* (1922 C. C. A. 2), 278 Fed. 895.

We also concede that a person can limit his servants' employment and by proper definite agreement lend them to another for certain purposes. The facts of this case, however, contradict or negative a relationship of master and servant between petitioner and respondent's tug captains. *Sternaman* v. *Metropolitan Life Ins. Co.* (1902), 170 N. Y. 13, 20.

Respondent asserts that, under the pilotage clause, it was beyond the scope of its tug captains' employment to leave their tugs and go aboard a vessel under steam. Petitioner did not ask them to do so, but respondent's own evidence shows that they went on the *Sabine Sun under its instructions.* Any such inference from the pilotage clause is over-

come where, as here, the tug captains were *expressly authorized by respondent* to take charge of the steamer and were *ordered to carry out respondent's instructions* while there. Even if the clause otherwise might validly accomplish its intended purpose, respondent has contradicted its language and displaced it in the case of the *Sabine Sun* towage.

The tug captains went on the steamer's bridge for their own convenience in supervising *respondent's work,* and they were just as much respondent's servants there as on their own tugs. *The Procida* (1917 S. D. N. Y.), 243 Fed. 251. As this court said in *Sturgis* v. *Boyer, supra:*

> "By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, nor ship the crew; nor can they displace either the one or the other. Their contract for the service * * * is * * * made with the owners of the vessel, and the master of the tug * * * continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation." Page 123.

What difference can it make if the tug captain chooses to act from the steamer's bridge? In the *Sturgis* case the tug captain piloted from the tow's quarter-deck (p. 121), but that did not relieve the tower of liability.

While maintaining that *the pilotage clause* was *a part* of the contract, respondent argues that it did not agree to supply *pilotage* as a part of that contract. Of course, Turnbull did not expressly order a pilot when he requested the service, but he expected that someone would take charge for respondent (R. 25, 29-30). *The Edward G. Murray, supra,* page 898. When requesting transportation one does not expect merely a vehicle, but also a person to operate and guide that vehicle.

Whether or not pilotage was contracted for here, a tug captain was furnished and authorized by respondent to pilot.

Fort himself testified that he was authorized and instructed by respondent to "go aboard the ship" (R. 44) and "to take charge of it" (R. 43). He placed the tugs, and gave the orders to them and to the ship (R. 34). George Dalzell, an officer of respondent company, admitted that his company *piloted* steamers for petitioner (R. 50),—a clear recognition that pilotage as well as towage was by respondent, the independent contractor.

Where a shipowner engages an independent contractor to do work, the contractor cannot send his employee to take charge, subject to his orders and control, and escape liability for the employee's negligent acts merely by calling him the shipowner's servant. In *Standard Oil Co.* v. *Anderson, supra,* this Court said at page 221:

> "He who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still in its doing his own work."

Sternaman v. *Metropolitan Life Ins. Co., supra,* involved an application for insurance containing an agreement that the medical examiner, selected, employed and paid by the insurer, would be the agent of the insured in examining him. The insured had nothing to do with the examination except to submit and answer questions. It was held (p. 22) that, notwithstanding the agreement contained in the application form, "the relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law," the court saying:

> "As between the examiner and the insured, the relation of principal and agent did not exist, while,

> as between the examiner and the company, that relation did exist by operation of law, yet it is claimed that as between the insured and the company, the examiner was the agent of the former, only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company, or its president, was his agent. It was in contradiction of every act of the parties and of every fact known to either." Page 20.

The pilotage clause at bar is not the determining factor of the relationship between petitioner and respondent's tug captain. That relationship must be determined by the selection, the employment, the control, and the work being done. *Standard Oil Co.* v. *Anderson, supra.* For the relationship to exist there must be a master as well as a servant. *Little* v. *Hackett* (1886), 116 U. S. 366. In *McNamara* v. *Leipzig* (1919), 227 N. Y. 291, 294, the court said:

> "The relation of master and servant is created by contract, express or implied. Of the elements which may constitute it, those that the servant must, in the course of the employment, be doing the work of the master under the will, direction and control of the master throughout all the details of the work, are essential."

One cannot serve two masters with conflicting interests, and "could not at the same time be properly deemed the servant of both parties." *Sturgis* v. *Boyer, supra,* p. 124. When respondent intentionally kept control, and continued the master of these tug captains, it made it impossible for them to become the servants of petitioner, irrespective of any prior pilotage clause.

Fort, under respondent's orders, refused to be petitioner's true servant. Respondent claims petitioner "accepted" him

because Turnbull acquiesced in his coming aboard the steamer and did not refuse to let him take charge. The acceptance of him as the independent contractor's supervisor of the work could not make him petitioner's servant. If the contract had oligated petitioner to accept, as its servant, any tug captain furnished by respondent, surely it would not obligate it to accept one over whom it had no control and who would not be subject to its orders. It could only require petitioner to accept a servant in fact.

There was evidence in this case that respondent's tug captain, Fort, received $15 from petitioner (R. 37), and respondent has claimed that this was a payment for his services to the *Sabine Sun*. This tug captain was on respondent's payroll, and of course he could not recover from petitioner for negligently grounding the steamer while on her in the performance of respondent's work, either on any express contract or on a *quantum meruit*. The fact that a gratuity was asked and paid does not prove either a contract or a relationship. The District Court correctly held, in conformity with the uniform holdings of other courts, that such payment was a mere gratuity (R. 77). *The Edward G. Murray, supra; The Procida, supra; The Caspian* (1925 E. D. Pa.), 14 F. (2d) 1006, aff'd (1926 C. C. A. 3) 14 F. (2d) 1013.

"The master of the tug remained in the employ of the respondent while performing pilot service for the vessel." *The Caspian, supra,* 1009.

FOURTH POINT.

The *Sabine Sun* was damaged by the negligence of respondent's tug captain, for which respondent is liable.

The lower courts did not decide whether the stranding was due to Fort's negligence, but held that because of the pilotage clause respondent would not be liable in any event. If, however, as we contend, Fort remained respondent's servant and there was no valid contract which relieved it of liability for negligence, it becomes necessary to consider respondent's liability on the merits.

This is a trial *de novo* in this Court. *Langnes* v. *Green* (1931), 282 U. S. 531, 536-7; *Watts, Watts & Co.* v. *Unione Austriaca, etc.* (1918), 248 U. S. 9, 21.

Respondent furnished the three tugs, their officers and crews, for a consideration, as capable of taking the *Sabine Sun* to her new berth. The captain of one of the tugs was furnished, and instructed, to take charge of the movement. It was admitted that, while he had complete charge, he guided the steamer into shallow water (R. 36-8, 40), which the evidence showed, and the District Court found, was outside the channel (R. 77). These facts establish a clear *prima facie* case of negligence on the part of respondent and its tugs. In the language of the Circuit Court of Appeals for the Second Circuit, "this case is one where the stranding of a steamer created a presumption of negligence." *The W. G. Mason* (1905), 142 Fed. 913, 914-5.

In *The Lizzie M. Walker* (1925), 3 F. (2d) 921, the Circuit Court of Appeals for the Fourth Circuit said:

> "The unexplained grounding of the steamer * * * is also evidence of the incompetency or negligence of her navigators." Page 922.

Respondent's tug captain was navigating the *Sabine Sun,* and he was either incompetent or negligent in taking her outside the channel where there was not sufficient water. The presumption against the tugs was overcome by Fort's testimony that they obeyed all orders given by him and did everything required of them (R. 46-7), but his consequent admission that it was at his orders that they went out of the channel with the steamer made the presumption against him and his employer stronger. He admitted that the steamer stranded while on a course voluntarily chosen by him (R. 36-8, 40).

Although Fort claimed that he was familiar with these waters (R. 37, 39), and had checked the deep water just before this time (R. 42-3), he did not know whether the *Sabine Sun* struck in or out of the channel (R. 37, 6). The most he would say was that he thought she must have been in the channel because she was on some arbitrary shore ranges which he had adopted (R. 37, 40). Respondent's other tug captain, Bennett, admitted that he was not familiar with the channel and did not know whether she was in or out (R. 49).

Fountain, a disinterested expert familiar with these waters, testified definitely that the *Sabine Sun* was out of the channel where she lay aground (R. 52). Fulton, the Army Engineer on duty there, took sextant angles on the steamer's stem (R. 74), which place her some distance east of the channel when plotted on Respondent's Exhibit K (R. 75). Indeed, respondent never attempted to prove that the stranding occurred in the channel, nor to show where it occurred on the chart used by Fort. On the evidence the District Court could not find other than that it was out of the channel (R. 77).

One who undertakes to transport a vessel is bound to know the channel, and, unless forced out by something be-

yond his control, to keep in it. In *Altee* v. *Packet Co.* (1874), 21 Wall. 389, this Court said:

> "The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. * * * But the pilot of a river steamer, *like the harbor pilot,* is selected for his personal knowledge of the topography through which he steers his vessel. * * * He must know where the navigable channel is, in relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sandbars, snags, sunken rocks or trees, or abandoned vessels or barges. All this he must know and remember and avoid." Page 396. (Italics ours.)

In *White* v. *Upper Hudson Stone Co.* (1917 C. C. A. 2), 248 Fed. 893, Circuit Judge HOUGH, speaking of a tug's duty to her tow, said:

> "She assumed the ordinary obligations of a towing vessel; *inter alia,* to know the recognized channel, the tides, the draft of the tow, and with reasonable skill to judge the weather." Page 895.

See also *Thompson* v. *Winslow* (1904 D. C. Me.), 128 Fed. 73, 82; *The Henry Chapel* (1882 D. C. Mass.), 10 Fed. 777, 778; *Great Lakes Towing Co.* v. *Alva S. S. Co.* (1919 C. C. A. 7), 261 Fed. 261, 262.

Before undertaking this job Fort obtained charts from the Army Engineers and personally located the channel by soundings. He found that there was 26 to 30 feet of water in the channel (R. 43). After taking such preliminary precautions he made no use of them, but, on the contrary, proceeded to navigate by some haphazard shore range, which he admits took him to the point of stranding (R. 37-8, 40).

The precautions taken a day or so before would be commendable if he had not then ignored them and trusted to arbitrary ranges, which were not shown to be either proper or in general use. There was no use in sounding for the channel if he was going to take a course outside where he did not sound (R. 42-3).

He testified that, because of his familiarity with the waters (R. 37), he did not need markings or aids to navigation (R. 39); but he used ranges which proved improper, rather than care in keeping to the established channel. He was furnished by respondent as one skilled in safely guiding vessels up into Newark Bay to Bayonne, and as this Court said in *Steamboat New World* v. *King* (1853), 16 How. 469:

> "It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence." Page 475.

In *The Margaret, supra,* this Court said that a tug taking a tow into port was not a common carrier nor an insurer, but nevertheless,

> "She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in every thing relating to the work until it was accomplished. The want of either in such cases is a gross fault, and the offender is liable to the extent of the full measure of the consequence." Page 497.

The Margaret involved a claim against a tug *in rem,* but the same claim could be made against her owner *in personam,* and here, where there is no claim *in rem,* the quotation applies to respondent, who assumed the duty.

No excuse was made for Fort's maneuver, and the only explanation attempted was his claim that the charts were

unreliable and that the waters were difficult because of dredging, rocks, treacherous tides, and a narrow channel (R. 33). Such general claims do not excuse, and Fort admitted that he knew of these matters before he undertook the maneuver (R. 42). There is not a scintilla of evidence that any of the alleged difficulties contributed to the stranding of the *Sabine Sun*. *Great Lakes Towing Co.* v. *Alva S. S. Co., supra,* page 264.

The channel was in fact about 500 feet wide (R. 55; Exhibit K, R. 75). There was no evidence of any drills or dredges which forced Fort out of it, and the only tow or vessel which passed during the entire period came down the bay about half an hour after the grounding. There was not even a suggestion that tides drove the *Sabine Sun* off the course adopted (R. 37-8), and the only rock which interfered with the navigation was that, outside the channel, on which the vessel stranded. The stranding was not brought about by any error of judgment *in extremis*. Fort made his plans in advance and kept on his intended route. *It was Fort's ranges that took him out of the channel,* not something for which he was not responsible.

In *The Vim* (1930), 40 F. (2d) 638, 640, the District Court in Rhode Island said that an understanding that a tug owner would tow to a new berth without responsibility "cannot exonerate him from the responsibility of a mishap resulting, *not primarily from the conditions over which he had no control,* but from the faulty carrying out the undertaking assumed." Likewise in this case no understanding should relieve respondent of liability for its tug captain's faulty choice of a course which would lead him outside the channel into shallow water.

Fort claimed that his chart was not reliable, but there is no evidence of this other than his bare statement. The chart could not be blamed unless the steamer stranded where it showed over 24 feet of water, and Fort's own soundings

verified the blueprint in showing that there was sufficient water except outside the channel (R. 43). A plotting on Fort's chart from Fulton's sextant angles discloses that the stranding was some distance east of the channel where the nearest sounding shown on the chart is only 19.9 feet, whereas the ship was drawing about 24 feet (R. 18, 74, 75), and Fort claimed that he thought she was drawing 25 feet 6 inches (R. 33). He admitted that the channel was good for 24 feet (R. 45), and he had no right to assume, if he did, that there was enough water where he had not found over 24 feet, and where the chart did not show it.

A stranding calls for an explanation, and exoneration requires proof that it was not due to the negligence of the person in charge. It requires the tower "to justify its conduct and reconcile it with proper towage." *The Primrose* (1930 C. C. A. 2), 42 F. (2d) 827, 828. It is not enough to say that there were dangers or difficulties present, and nothing would excuse his going out of the channel on a course voluntarily chosen by him. Respondent would be liable for Fort's choice of a course out of the charted deep water. One acting as pilot is not required to know the condition outside the channel, because he is not expected to go there; but reasonable care required Fort not to take chances in the unknown waters east of the channel. *The Somers N. Smith, supra,* 571-5. "When this is shown, the charge of negligence is made out without proof of what it was which was struck." *The Caspian, supra,* 1012.

We believe the law was correctly stated by the Circuit Court of Appeals for the Second Circuit in *The Arlington* (1927), 19 F. (2d) 285:

> "It is of course well established that a tug master is not liable for injuries caused by grounding his tow upon an uncharted and unknown rock in the fairway * * * but he has the burden of so showing * * * because *prima facie* he is at fault. Moreover, if he

> voluntarily leaves the channel he does so at his peril, though the rock or shoal be both uncharted and unknown." Page 286.

The fact that Fort thought there were things to interfere with navigation did not overcome the presumption of negligence from stranding outside the channel, when he was keeping on the shore ranges and course he had adopted. If the claimed dangers did, in fact, exist, they created special circumstances which required the exercise of a decree of care commensurate with the difficulties to be encountered. In *Davidson S. S. Co.* v. *U. S.* (1907), 205 U. S. 187, this Court said:

> "Now there is an obligation on all persons to take the care which *under the special circumstances of the case* a reasonable and prudent man would take, and the omission of that care constitutes negligence." Page 193. (Italics ours.)

In *The W. G. Mason, supra,* two tugs grounded a steamer in waters where there was a difficult unmarked channel with two very sharp turns. The channel was narrow, with shoals on either side and varying currents. The tug whose captain was piloting was held responsible for failure to disprove negligence on his part. Circuit Judge WALLACE, speaking for the Circuit Court of Appeals for the Second Circuit, said:

> "The towage service was to be performed in a part of a channel where thorough acquaintance with the conformation and boundaries, effects of the current, and location of the submerged rocks, was of the utmost importance, * * *.
>
> * * * * * * * *
>
> "It suffices that the misfortune occurred without any fault on the part of the tow * * *, and under a state of circumstances in which, if proper care is ex-

ercised in performing a similar service, such misfortune does not ordinarily occur. This was enough to impose upon the tugs the burden of proof to show that they had exercised due care. (Citing cases.)" Pages 914-5.

The only care claimed for Captain Fort was his preliminary precautions (later discarded) to locate the deep water and his use of arbitrary shore ranges. Respondent claims that it was not negligence for Fort to strand the steamer while on these ranges, because they were the "usual ranges." We dispute this claim, and there is no evidence to support it. Without explaining where he got them, Fort described his ranges as "a big gas tank over the street" (R. 34), and "the gas tower and an open street" (R. 38). He said that when he would "get the tank over the street" he would start to turn (R. 38) and then "head up to the west end of the bay," keeping the tank "in line" (R. 34).

The only other evidence in the record of any ranges was of those used by Captain Fountain in taking vessels up there for years without accident (R. 51-2). He testified that he would go "easy by Bergen Point Light until my bow is I judge about half way between Bergen Point Light and Shooters Island, and then I start to make the turn" (R. 54), that "the proper way is to have the gas tank over the house that is on the west side of the street, and then you begin to turn" (R. 60); and having done that he would "straighten her up, get her on ranges; I use a church steeple on Staten Island, and the middle tower of the railroad bridge across Newark Bay, and head her between those two marks and go up" (R. 54-5).

The only similarity in these ranges is that there is a gas tank and a street in both. Fort said he started to turn when he sighted *a gas tank over a street* (R. 38), but Fountain determined when to turn by sighting *a tank over a house*

on the west side of a street (R. 60). After making the turn Fountain used new ranges, heading between a church steeple and the middle tower of a railroad bridge (R. 54-5). He would have been on these latter ranges, but Fort kept on the turning ranges of the gas tank and street, and was on those when the steamer struck (R. 37-8).

Even if the same gas tank and street were used by both men to determine *when to turn out of Kill van Kull,* that does not make them *usual for navigating in Newark Bay.* Fort said his ranges took him to the point of stranding (R. 37-8), but Fountain's ranges would have taken him half way between there and Shooter's Island (R. 55), or over 400 feet to the west of the rock. If Fort did use Fountain's ranges, he certainly used them in a different manner.

There was testimony that some other vessels grounded *in the neighborhood,* but there was no evidence of their size or draft, the weather and tide conditions, whether they were in or out of the channel, nor of any of the circumstances under which they had stranded. None was shown to have struck the rock on which the *Sabine Sun* stranded. The bare evidence of other groundings is clearly immaterial. The *Sabine Sun* stranded out of the channel under ideal navigating conditions (R. 32), and was not interfered with by obstructions or other navigation (R. 37-8). As far as appears, there may have been some good excuse for the other strandings in Kill van Kull and Newark Bay; but, in any event, the negligence of others would not excuse respondent nor overcome the presumption imposed by law against its tug captain in charge.

The stranding of the *Sabine Sun* occurred on a course purposely taken by Fort. Although in court, he did not dispute that he had to call on Captain Fountain to get him off the rock and safely around Bergen Point. Fort's precautions of the day before did not excuse him in view of his disregard of all due caution during the maneuver. Indeed, his reckless disregard of the valuable information he had ob-

tained was negligence in itself. In the absence of any reasonable explanation of, and excuse for, such conduct, he is responsible for the stranding outside the channel; and respondent is liable for his negligence in so doing. *Sturgis* v. *Boyer, supra; The Margaret, supra; The Edward G. Murray, supra; The Procida, supra; The Caspian, supra; Wilmington Ry. Bridge Co.* v. *Franco-Ottoman S. Co., supra; Allaguash* (E. D. N. Y.), 1930 A. M. C. 1981, 1983.

FIFTH POINT.

Turnbull did not assume responsibility for Fort's negligence.

Because this is a trial *de novo,* and the lower courts did not pass upon one of respondent's defenses (R. 6), it would seem proper for us to discuss it briefly. It has to do with an alleged oral assumption of risk by petitioner's assistant marine superintendent, Turnbull. Fort said (R. 35) he told Turnbull that the channel up to Bayonne was risky and Turnbull said, "I will take the risks" and "If we do as good as we did the last time I will be very much pleased." Again he testified of Turnbull, "He said he would depend on my judgment and if I did as good a job then as I did before, he would be satisfied" (R. 43). Bennett confirmed some such statements by Turnbull, but he was "standing too far away to get it all" (R. 48).

Turnbull emphatically denied such a conversation (R. 60, 28).

Regarding this alleged assumption of risk, the District Judge said (R. 77):

> "So far as the conversation, in which Fort says that Turnbull assumed the risks incident to the navigation of the *Sabine Sun,* is concerned, I am of the belief that it should not, granting that it took place, affect the question of liability."

This statement indicates that the Court doubted that such a conversation took place, and we submit that the unusualness of it would create doubt in any mind. Fort did not say that he asked Turnbull to assume the risk or to do anything else; he pictured Turnbull as voluntarily assuming a risk merely because Fort "explained to him the conditions" (R. 35). Is it reasonable to suppose that Turnbull would gratuitously release Fort and respondent from all responsibility for negligent navigation in the difficult and dangerous conditions pictured by Fort? Could he do it without authority from petitioner, to whom respondent owed a legal duty to use reasonable care?

Fort's testimony in this regard will bear a little scrutiny. Although he testified to a gratuitous assumption of risk, his recital of Turnbull's remarks is illuminating and casts considerable doubt on such a broad statement. He said that Turnbull told him he would be satisfied if Fort would *do as well* as on the last job, when one of petitioner's steamers was taken through Kill van Kull, not Newark Bay (R. 41-2), without stranding (R. 44). He did *not do as well* with the *Sabine Sun,* and did not satisfy Turnbull's requirement.

Even if such a statement as Fort claims had been made by Turnbull, it could not be considered as an assumption of the risk of Fort's negligent or wanton acts; it would cover only the dangers that might be encountered in the channel by a competent and careful pilot. In *The Vim, supra,* a tug owner claimed that when engaged to move a barge he advised the barge owner that the place it was to be moved to was not safe, and that it was understood that he would not move it on his own responsibility. The court said:

> "Such an understanding as that claimed by Hayes cannot exonerate him from the responsibility of a mishap resulting, not primarily from the conditions over which he had no control, but from the faulty carrying out of the understanding assumed." Page 640.

In *The Edmund L. Levy, supra,* page 684, the Circuit Court of Appeals for the Second Circuit approved the following language of the District Court in the same case:

> "Because the canal-boat assumed the risk of ice, she did not thereby authorize towing in the same manner as if the ice were absent."

Likewise in this case, if Turnbull assumed the risk of the channel up Newark Bay, he did not assume the risk of Fort's taking the steamer out of the channel into unknown waters.

In considering the contract alleged to have been made by Turnbull, it is helpful to inquire into the consideration for his gratuitous promise. In answer to the District Court's inquiry, Fort testified that "if he (Turnbull) hadn't taken the risk, I would have taken the ship back to anchorage" (R. 36). When asked whether he thought it proper to wait until the vessel was part way, and then refuse to assume responsibility, he testified:

> "A. These are my orders, that is all I know; * * *.
> "Q. And what did you agree to do if he assumed the responsibility? A. I would do my best to take the ship in." (R. 44.)

Of course, Fort had no right to take petitioner's ship back to where Bennett had first taken her in charge, either with or without a promise from Turnbull; and to have done so would have been a breach of respondent's contract to complete the job that had been commenced at Stapleton. Such a promise as Fort claims would have been obtained from Turnbull, if at all, by duress at a time when the *Sabine Sun* was under Fort's control in waters with which her master was not familiar. To allow a tug captain to force such a promise, without any consideration, legal or otherwise, after the flotilla was under way, would be to approve duress and put a premium on respondent's breach of the original towage

contract. This alleged agreement, being unsupported by any consideration, could not constitute a modification of the towage contract.

Respondent argues that Fort's willingness to continue on was sufficient consideration to support the alleged promise of Turnbull. In the lower courts it cited, in support of this argument, cases holding that a tug captain is negligent in not turning back in time if he finds dangerous conditions ahead. We do not question those cases as applied to the facts then before the courts; but they were not cases where the tugs were required to turn back *because of conditions that were known before they set out,* and which would not seriously interfere with the navigation of a skilled navigator. Neither the weather, the tides, nor the channel changed after this towage service was undertaken, and no obstruction appeared to have been added to, or changed in, the channel.

The very fact that Fort continued on shows that he would not have been justified in turning back—unless because of incompetence. Whether it would be advisable to go ahead or to turn back could not depend on Turnbull's assumption of risk.

Fort was under obligation to complete the towage and could not, by threats, transfer his responsibility to petitioner. The unusual agreement claimed would be wholly one-sided. We deny that such an agreement was made, and submit that, if it had been made, it would have been a promise without consideration, and not binding.

All that this testimony indicates is that respondent and Fort did not then think that Fort was petitioner's servant.

Conclusion.

The tug captain in charge of moving petitioner's steamer, under respondent's authority and instructions, was an employee acting in the service of respondent. The steamer was damaged through his voluntary act, due either to incompetence or negligence, for which respondent would be liable. As petitioner did not assume the risk of his navigating out of the channel, and there was no valid contract relieving respondent of liability for negligence or incompetence, the decision below should be reversed and petitioner awarded an interlocutory decree against respondent with a reference to ascertain and compute the damages.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 38

SUN OIL COMPANY,

Petitioner,

v.

DALZELL TOWING COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 874

SUN OIL COMPANY,
Petitioner,
v.
DALZELL TOWING COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's statement of facts is not only wholly inadequate but it is misleading.

FACTS

On May 14, 1925, the assistant marine superintendent of Sun Oil Company (petitioner) came to New York from petitioner's main office at Marcus Hook, Pennsylvania, to arrange for the docking of the steamship *Sabine Sun* (using her own propelling power) at Texas Oil Company's plant, Bergen Point, New Jersey. The order for the tugs to assist the steamer to her berth was given to the Dalzell Company (respondent) by petitioner's superintendent on May 14, 1925 (R. 22-3).

The *Sabine Sun* arrived in New York Harbor, anchored off Stapleton and lightered sufficient cargo to reduce her

draft to 24 feet. On the afternoon of May 15 the tug *W. F. Dalzell* came alongside the steamer, which then got under way for Bergen Point, with Bennett, captain of the *W. F. Dalzell,* on the steamer's bridge acting as pilot. The steamer was joined by tug *Dalzellite* off St. George, Staten Island, and proceeded under her own steam through Kill van Kull. When off Port Richmond, the flotilla was joined by tug *Fred B. Dalzell, Jr.,* where the captain of the latter (Fort) went on the steamer's bridge and took charge of her navigation, relieving Captain Bennett as pilot* (R. 23, 26, 58).

There were on the steamer's bridge at this time, in addition to the two tug captains, the steamer's master, her third officer, her quartermaster, and Turnbull, petitioner's assistant marine superintendent. The weather was clear, no wind, tide flood, about one hour before high water (R. 41).

Petitioner's superintendent (Turnbull) and been in New York a number of times before and had ordered tugs from respondent to assist petitioner's steamers to their berths. He had always proceeded on the steamer to destination, and on each occasion a tug captain from one of the assisting tugs had been used as pilot, going on the steamer's bridge and act-

* Captain Bennett was not familiar with nor licensed for the water further on; Captain Fort was licensed for those waters; he had been piloting steamers in and out of Newark Bay for many years. There is no question as to his experience and competency as pilot in the waters where the stranding occurred (R. 41-2). Furthermore, inasmuch as petitioner's steamer was drawing more than any vessel that the pilot had taken into Newark Bay up to that time, on the previous day, the pilot took soundings in the vicinity he was to pilot the steamer and made every effort to obtain the latest information concerning the changes due to blasting and dredging and obstructions on the bottom. He even called upon the U. S. Army Engineers, who were in charge of the blasting and dredging operations, for all the information available (R. 42, 45, 53, 99).

ing as pilot. Petitioner's superintendent "expected" a tug captain to act as pilot on this occasion and accepted the tug captain (Fort) to act in that capacity (R. 33-4, 38, 117).

Upon boarding the steamer, the tug captain (Fort) informed petitioner's superintendent that there was considerable risk in taking a steamer of the size and draft of the *Sabine Sun* into Newark Bay at that particular time, because of the blasting and dredging operations which were going on in the vicinity of Bergen Point, and the absence of reliable charts. Turnbull agreed to take the risk, relying on Captain Fort, who had previously acted for him as pilot (R. 44-6, 59, 99-100).*

The *Sabine Sun* then proceeded under her own steam (using her own propelling power) to Bergen Point and made the usual turn—about 90° to starboard—into Newark Bay with the assistance of the three tugs. While proceeding up the Bay on the usual ranges† about 3:30 P. M., the steamer struck an obstruction on the bottom and remained fast. Cargo was lightered from her forward tanks and she then proceeded to her destination about 6 P. M. (R. 25, 67).

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* Turnbull at first testified that he did not remember any conversation with the pilot (R. 35). Later he denied that he had had any conversation with the pilot having to do with the character of the channel and the dangers and risk to be incurred (R. 36-7). Although the District Court found it unnecessary to pass upon this conversation between the pilot and Turnbull, the language of the opinion indicates that the Court believed that it did take place (R. 101). Furthermore, Turnbull also denied knowledge of the "pilotage clause", but both the Courts below found against him on this issue (R. 103, 119).

† The pilot was using the usual ranges at the time the ship struck, *i. e.*, a gas tank and a street on Staten Island. The pilot since used the same ranges with vessels of the same and greater draft and at the same stage of the tide, without accident (R. 43, 46, 72-3).

Danger of the manœuvre

Petitioner would have the Court believe that this was a simple manœuvre and that the pilot was guilty of negligence (Petition, p. 4). On the contrary, the manœuvre was a difficult task at this particular time, because blasting was going on in the vicinity; there were drills in the way; the channel was not marked, and there were no reliable charts of the vicinity in its then condition. At the time of this accident there was so much work of blasting and dredging going on in the vicinity that the United States Engineers would not vouch for the Government charts. There were no aids to navigation and it was necessary to "use your own" (R. 42, 72-3). The only guide for navigating was the natural ranges on the adjacent land, which the pilot used, to wit: a gas tank and street on Staten Island, the ranges he had used before and since without mishap (R. 42, 47-8, 50). Indeed the ranges used by the pilot on this occasion were the same as those used by petitioner's expert (R. 43, 46, 72-3).

Because of the danger, due to local conditions, before taking the job, the pilot took soundings in the vicinity of Bergen Point, called upon the U. S. Army Engineers and made every effort to obtain the latest information concerning the deepest water in the vicinity and obstructions on the bottom (R. 42, 45, 53, 99). The pilot did his best with what he had, but this accident occurred in spite of his efforts, just as several other steamers, in charge of experienced pilots, had stranded on obstructions in the same vicinity (R. 70-2).

THE CONTRACT BETWEEN THE PARTIES

The contract was oral, and, as usual in cases of this kind, consisted merely of an order telephoned by petitioner's superintendent, and accepted by respondent, to send tugs to assist in berthing the steamer at a certain time and place. It is necessary, therefore, that the full terms of the contract be spelled out from the previous dealings of the parties. Nothing was said about pilotage, but petitioner's assistant marine superintendent (Turnbull) understood that his vessel would proceed under her own propelling power, and that one of the tugboat captains would come up on her bridge and take charge as pilot (R. 33-4, 38). The parties had previously done business on this basis (R. 117).

The pilotage clause, which was a part of the contract between the parties, provided as follows:

"When the captain of any tug furnished to or engaged in the service of assisting *a vessel which is making use of her own propelling power* goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel *assisted* in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom (Exhibit C; R. 86), 117).

Although it was contended below that the clause was not brought to the attention of petitioner, both of the lower Courts found against petitioner on this question of fact (R. 101-2, 118).

No claim was made by petitioner against respondent, nor was any intimation received by respondent that there would

be any claim of liability against respondent until nearly a year after the accident (R. 60).

Although a survey of the damage to the steamer was held shortly after the accident, no notice of survey was given to respondent, nor was respondent afforded an opportunity of attending upon the survey (R. 60).

District Court Opinion

The District Court made no finding on the question of negligence (R. 104),* holding that the pilot in charge at the time of the accident (second tug captain) was petitioner's servant by the terms of the "pilotage clause", and that if there was any negligence, the "pilotage clause" relieved respondent from liability therefor (R. 101-4).

Circuit Court of Appeals Opinion

The Circuit Court of Appeals found that "the contract between the parties included the pilotage clause as one of its terms" (R. 118).

The Court then referred to *The Syracuse,* 12 Wall. 167, and *The Wash Gray,* 277 U. S. 66, relied upon by petitioner (Petition, p. 6; Brief, p. 13), and pointed out that those cases involved *towage,* whereas the instant case was one of *pilotage,* saying:

"* * * a distinction may well be taken between a towage contract as such and a pilotage contract. When a tug-owner is engaged in towing a dead vessel, he may limit his liability to the value of his tug. It is conceivable (although

* It appears from the Court's opinion, however, that the District Court did not consider that the pilot was negligent (R. 99).

we should not so decide unless constrained by controlling authority) that, having granted the privilege of limited liability, the law forbids a towing company from gaining complete exemption from liability if the tug is at fault. But when the 'assisted vessel' is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot (*The Sarnia*, 261 F. 900 (C. C. A. 2)) and no limitation of liability of the tug owner. We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: 'I will furnish a man believed to be competent but you must assume the risk of his errors'" (R. 120).

Neither court decided whether petitioner's superintendent agreed to take the risk of the manœuvre. (See this brief, p. 3.)

Petitioner now argues that if its superintendent agreed to take the risk on behalf of petitioner, it was without consideration (Petition, p. 3). We can conceive of no better consideration than that testified to by the pilot, viz., "if he (Turnbull) hadn't taken the risk, I would have taken the ship back to anchorage" (R. 46). No navigator is bound to keep on against his judgment in the face of danger.

The Edgar H. Vance, 284 Fed. 56 (C. C. A. 9);
The E. A. Packer, 22 Fed. 668 (S. D. N. Y.).

ARGUMENT

FIRST POINT

THE CONTRACT WAS ONE OF PILOTAGE, NOT TOWAGE

It is apparent that petitioner has confused pilotage and towage. In both the petition and argument repeated references are made to the towage contract and the "contract to tow or transport" (Petition, pp. 4, 5; Argument, pp. 11, 12, 19). This was not a towage contract. There is nothing in the contract, either expressed or implied, that respondent agreed to *tow* petitioner's steamer (*Sabine Sun*). The steamer was under her own steam and "making use of her own propelling power" (R. 41, 44). The contract was to furnish tugs to assist a steamer which was being operated entirely by her own machinery, viz., her master, officers and crew were at their stations, her own propelling power was being used and she was being steered by her own steering apparatus* (R. 33, 38, 117).

Petitioner's steamer was required to have a pilot to direct her navigation through the Kills and to her berth. That pilot could be anybody licensed to pilot in those waters. He might be the ship master (which would be the case if he had a license for the waters), a Sandy Hook pilot, a coast pilot, or any outside tug captain holding a proper license. The "pilotage clause", which was made part of the contract between the parties, merely makes it a condition of the contract that if "the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of

* The tugs engaged in the service were owned by individuals and respondent was merely their agent. No error was assigned in the Circuit Court of Appeals to the dismissal of the libel as against the tugs, and petitioner does not complain here of that part of the decision below (R. 109-13; Petition, p. 1).

her own propelling power goes on board said vessel, * * *" he "becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service or in respect to the handling of such vessel, * * *." It is clear that the condition comes into operation *only* when the tug captain "goes on board" the vessel assisted, and when that vessel "is making use of her own propelling power".

The situation is not analogous to and has nothing in common with the cases of *towage* as presented by *The Syracuse*, 12 Wall. 167, *The Wash Gray*, 277 U. S. 66, and other cases referred to by petitioner (Brief, pp. 13-14). In those cases the vessels were *not* being navigated. They were without steam and *not* using their own propelling power— they were entirely under the control of the towing vessel, viz., they were being *towed*. In the instant case petitioner's steamer at no time was being towed. She was at all times using her own propelling power; the tugs were not there to tow, but to assist the steamer as ordered from the steamer's bridge (R. 120).

The difference is vital—entirely different principles are applicable. In one case (towage) the vessel is without motive power and completely under the control of the towing vessel; in the other (pilotage) she is in charge of her own movements and is being *assisted* by tugs when necessary as ordered from the steamer's bridge.

Where a steamer is being *towed* the vessel owner has a maritime lien on the tug for damage sustained as a result of any error or negligence on the part of the tug captain (pilot) in charge.

Sturgis v. *Boyer*, 24 How. 110;
The Express, 52 Fed. 890 (C. C. A. 2);
Central Wharf Towboat Company v. *Furness Withy*, 269 Fed. 950 (C. C. A. 1).

But where a vessel is under her *own steam, i. e.,* using her own propelling power, there is no maritime lien on the tugs for errors of the pilot in charge.

In *The Sarnia,* 261 Fed. 900 (C. C. A. 2) the Court said:

"The tug *Palmer* committed no fault, and when Barrett furnished the *Sarnia* with a pilot in the person of Capt. Slauer, he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on the *Sarnia's* bridge and managing that steamer *with her own steam"* (p. 901).

SECOND POINT

THE PILOTAGE CLAUSE IS VALID

The clause is quoted at page 5 of this brief and will be found also at page 86 of the record. A cursory reading of the clause shows that it does not attempt to evade responsibility for the fault or negligence of the tug, as in the "risk of tow" cases referred to by petitioner (Brief, pp. 13-14). The clause merely makes it a condition of doing business with respondent that if one of the tug captains engaged in the service of assisting a vessel "which is making use of her own propelling power" "goes on board said vessel", he "becomes the servant of the owners of the vessel assisted" in respect to the giving of orders and handling of the vessel. In other words, respondent did not furnish, as such, a pilot to take charge of petitioner's steamer. Indeed, it is not contended by petitioner that its superintendent ordered a pilot—he merely ordered tugs (R. 22, 33-4, 38, 117).

The contract contains no agreement on the part of respondent to furnish a pilot, and the pilotage clause is an express repudiation of any such intent. Respondent

furnished tugs to assist the steamer and by the "pilotage clause" made it clear that it was beyond the scope of the employment of the tug captain to leave his tug and go aboard a steamer using her own propelling power and take charge. However, it was expressly provided that if the captain *did* leave his tug and go aboard the steamer, he became the servant of petitioner in respect to giving orders and handling the steamer.

There is no principle of law which forbids an employer (respondent here) from informing parties with whom it contracts (petitioner here) that its servants are acting beyond the scope of their employment when they assume duties beyond the border of the property owned by respondent, and that its general servants are not its servants for the performance of particular acts, and that if its general servants undertake to perform such particular acts, they become for that purpose the servants of petitioner.

Standard Oil Co. v. *Anderson*, 212 U. S. 215, 220;
Denton v. *Yazoo & Miss. Valley Rld. Company*, decided by this court January 4, 1932, 76 L. E. 209.

The pilotage clause was first passed upon (and upheld) in *The Nonpareil*, 1924 A. M. C. 312 (S. D. N. Y). The Court said:

"All harbor towing in this port of steam vessels with steam up is done on these terms * * *" (p. 318).

The clause has since been upheld in the following cases:

The Wireless No. 1, 290 Fed. 239 (S. D. N. Y.);
The Niels Finsen, 52 F. (2d) 795, (S. D. N. Y.);
The Hagood, 1925 A. M. C. 1646 (E. D. N. Y.);
The Energy-Altamaha, 1926 A. M. C. 917 (S. D. N. Y.);
McGirr's Sons v. *Mutual*, 1927 A. M. C. 382 (S. D. N. Y.);

The Watertown-Oran, 1930 A. M. C. 1523 (S. D. N. Y.);

Lee & Simmons Inc. v. *Peursum,* 1931 A. M. C. 699 (E. D. N. Y.);

Foreign Transport Co. v. *Moran* (Opinion April 4, 1932) (C. C. A. 2), not yet reported.

In the *Pacific Maru,* 8 F. (2d) 166 (S. D. Ga.), a much broader clause was passed upon and upheld, following an admirable discussion of the cases. The Court said:

"So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress. The contract of exemption from liability is valid. There was no need to offer an alternative contract at a different rate. Such requirement would violate the freedom of contract" (p. 173).

Counsel for petitioner rely upon *The Wash Gray* (*Compania de Navegacion* v. *Firemen's Fund Insurance Company*), 277 U. S. 66, and *The Syracuse,* 12 Wall. 167 (Brief, p. 13).

The pilotage clause was not involved in either case. In *The Wash Gray,* the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. *S. S. Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who defended on the ground that the contract above quoted dis-

charged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

Concerning the *The Wash Gray,* the Circuit Court of Appeals said in the instant case:

"If the opinion lays down only a rule of construction, it is too clear for argument that it does not apply to the pilotage clause in suit which indubitably expresses the intention to put upon the 'assisted vessel' the risk of the pilot's handling of her. If, on the contrary, the opinion lays down the rule that a towing vessel cannot release herself from liability for negligence, however clearly that intention be expressed in the contract of towage, a distinction may well be taken between a towage contract as such and a pilotage contract" (R. 120).

The Syracuse, 12 Wall. 167, involved a *towage* contract where the boat was towed under a contract whereby the owner of the tug agreed to bear the risks of the navigation, provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill (p. 170). This Court held that the steamboat was not navigated with ordinary care and skill and she was held at fault.

THIRD POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS REFERRED TO BY PETITIONER.

Petitioner would have the Court believe that the "pilotage clause" now before this Court (or a similar clause) has been held invalid by this Court and in various other Circuits, and held valid in the Second and Fifth Circuits (Brief, p. 15). This is not the fact. The pilotage clause, now before this Court, has actually been passed upon only in the cases referred to above under Point II of this brief, and in each case it has been upheld.

In *Calzavaro* v. *Planet S. S. Corp.,* 31 F. (2d) 885 (C. C. A. 4) (Petitioner's Brief, pp. 14, 17), the contract between the parties included a similar clause, but the steamer was *not* under her own propelling power and the clause was *not* passed upon (p. 89).

In *British Columbia* v. *Mylroie,* 259 U. S. 1 (Petitioner's Brief, pp. 14, 16), the parties agreed that the tug would render the barge "reasonable assistance from time to time in any emergency which might arise" and that the tug company "is not to be held liable for any damage which might happen to the said barge, *Bangor,* or its cargo, while in tow or at anchor" (p. 11). This Court held that the clauses of the contract seemed to be in conflict. They were reconciled by holding that the tug was not liable unless she should fail to render reasonable assistance to the tow in an emergency, and it was found that the tug did not render the assistance as required by the contract. This Court said:

"This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void" (p. 12).

All the other cases referred to in petitioner's brief involve *towage,* viz., vessels *not* using their own propelling power.

As for towage (not involved here) the situation is clearly stated by the Circuit Court of Appeals (R. 119).

FOURTH POINT

THE TUG CAPTAIN (PILOT) WAS THE SERVANT OF THE PETITIONER PURSUANT TO THE TERMS OF THE "PILOTAGE CLAUSE".

Petitioner concedes that there was a contract between the parties and that the pilotage clause is a part of that contract, which provided in part:

"Where the captain of any tug furnished * * * goes on board said vessel * * * it is understood and agreed that said tugboat captain * * * becomes the servant of the owners of the vessel assisted * * *." (Petitioner's Brief, p. 18.)

But petitioner contends that the relationship of master and servant did not exist because petitioner did not "choose" the pilot, and the pilot went on the steamer's bridge "without consulting or being requested by petitioner" and one pilot was substituted for another during the voyage without consulting petitioner (Petition, p. 3, Brief, pp. 18-19).

This contention overlooks, certainly disregards the facts, viz., it was necessary to have one pilot succeed the other, because the first pilot was not familiar with nor licensed for the waters further on (see this brief p. 2). As for choosing the pilot and requesting him to come on board petitioner's steamer, petitioner's assistant marine superintendent (Turnbull) was in full charge of the whole operation and admitted that he "expected" a tug captain to act as pilot and accepted

the tug captain (Fort) to act in that capacity (R. 33-4, 38). Both the District Court and the Circuit Court of Appeals so found (District Court opinion, R. 102; Circuit Court of Appeals opinion, R. 117).

Furthermore, there was no mystery about the matter; there was no reason for consultation as to the pilot, nor was it necessary that petitioner request respondent to send a pilot, nor in the ordinary course of their dealings would petitioner choose the pilot. As the Circuit Court of Appeals said:

> "Nothing was said about pilotage, but Mr. Turnbull (petitioner's superintendent) understood that his vessel would move under her own steam and that one of the tugboat captains would come upon her bridge and take charge as pilot. The parties had previously done business together, * * *" (R. 117).

Although agreeing with the Circuit Court of Appeals that a "person who merely supplies a pilot" can "exempt itself from liability for the negligence" of the pilot so supplied to be the agent of the ship piloted, petitioner contends that this was "not merely a contract to supply a pilot", but "a contract to *move* a vessel with the aid of tugs, * * *" (Petitioner's Brief, p. 19). Not at all! As we have shown under Point I, this was a contract to furnish tugs to *assist* a vessel "making use of her own propelling power" and manned by her own master, officers and crew. As usual under the circumstances, one of the tug captains boarded the steamer and acted as pilot. It was for this reason that the "pilotage clause" was made a part of the contract between the parties, *i. e.*, if petitioner desired to use one of the respondent's tug captains as pilot, it was subject to the terms of the "pilotage clause".

While it is true that the steamer was required to have a pilot to direct her navigation, it was immaterial to respondent

where this pilot was obtained. Petitioner could have employed a Sandy Hook pilot or a coast pilot or any other tug captain licensed for these waters. Many ship masters are licensed for the waters navigated by their vessels and are qualified to take charge of docking and undocking. That the pilot was the captain of one of the assisting tugs does not alter the terms of the contract between the parties whereby he became the servant of the ship owner.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI BE DENIED.

CHAUNCEY I. CLARK,
Counsel for Respondent.

Dated New York, April 30, 1932.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY,

Petitioner,

vs.

DALZELL TOWING COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI

CHAUNCEY I. CLARK,
Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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Pilotage Clause 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 38

SUN OIL COMPANY,
Petitioner,
vs.
DALZELL TOWING COMPANY, INC.,
Respondent.

BRIEF FOR RESPONDENT ON WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURTS BELOW

This is a review on writ of certiorari of a decision in admiralty of the United States Circuit Court of Appeals for the Second Circuit, affirming a decision of the District Court for the Southern District of New York dismissing petitioner's libel against the steamtugs *Dalzellite, W. F. Dalzell* and *Fred B. Dalzell, Jr.,* in *rem,* and against the Dalzell Towing Company, Inc., respondent, in *personam.**

The opinion of the District Court was rendered on November 25, 1930, and is printed at pages 75-9 of the record. It is reported in 48 F. (2d) 598.

The opinion of the Circuit Court of Appeals was rendered on January 11, 1932, and will be found at pages 84-9 of the record. It is reported in 55 F. (2d) 63.

* The tugs *Dalzellite, W. F. Dalzell* and *Fred B. Dalzell, Jr.,* are not involved in the appeal to this Court.

II.

Statement of the Case

Petitioner is the owner and operator of the tank steamship *Sabine Sun* (R. 14). Respondent is engaged in the tugboat business in and about New York Harbor, and as such furnishes tugs (not owned by it) to assist steamers in and around the harbor. At the times involved in the instant case respondent operated, among others, the steamtugs *W. F. Dalzell, Dalzellite* and *Fred B. Dalzell, Jr.* (R. 5, 61, 64).

The cause of action arose out of the grounding of petitioner's steamship *Sabine Sun* on an obstruction in Newark Bay in the vicinity of Bergen Point on May 15, 1925. At the time of the accident the *Sabine Sun* was navigating under her own propelling power and was being assisted by tugs furnished by respondent. The steamer's bottom was damaged by reason of striking the obstruction, and it was to recover for this damage that the libel was filed.

All the witnesses testified in open Court, two for libellant and three for respondent.

The facts involved are as follows:

On May 14, 1925, the Assistant Marine Superintendent of Sun Oil Company (petitioner) came to New York from petitioner's main office at Marcus Hook, Pennsylvania, to arrange for the docking of its steamship *Sabine Sun* (using her own propelling power) at Texas Oil Company's plant, Bergen Point, New Jersey. The order for tugs to assist the steamer to her berth was given to the Dalzell Towing Company, Inc. (respondent) by petitioner's superintendent on May 14, 1925 by telephone (R. 14-15, 23-4).

The *Sabine Sun* arrived in New York Harbor on May 14, anchored off Stapleton, Staten Island, and lightered sufficient

cargo to reduce her draft to 24 feet. On the afternoon of May 15, tug *W. F. Dalzell* came alongside the steamer, which then got under way for Bergen Point, with Bennett, captain of the *W. F. Dalzell,* on the steamer's bridge acting as pilot. The steamer was joined by tug *Dalzellite* off St. George, Staten Island, and proceeded under her own steam through Kill van Kull. When off Port Richmond, the flotilla was joined by tug *Fred B. Dalzell, Jr.,* where the captain of the latter (Fort) went on the steamer's bridge and took charge of her navigation, relieving Captain Bennett as pilot * (R. 15, 18, 32, 47).

There were on the steamer's bridge at this time, in addition to the two tug captains, the steamer's master, third officer, quartermaster, and Turnbull, petitioner's assistant marine superintendent. The weather was clear, no wind, tide flood, about one hour before high water (R. 32, 48).

Petitioner's superintendent (Turnbull) had been in New York a number of times before and had ordered tugs from respondent to assist petitioner's steamers to their berths. He had always proceeded on the steamer to destination, and on each occasion a tug captain from one of the assisting tugs had boarded the steamer and acted as pilot. Petitioner's superintendent "expected" a tug captain to act as pilot on this occasion and accepted the tug captain (Fort) to act in that capacity (R. 24-6, 29, 86-7).

Upon boarding the steamer, the tug captain (Fort) informed petitioner's superintendent (Turnbull) that there was considerable risk in taking a steamer of the size and draft of the *Sabine Sun* into Newark Bay at that particular time, because of the blasting and dredging operations which were

* Captain Bennett was not familiar with nor licensed for the water further on; Captain Fort was licensed for those waters; he had been piloting steamers in and out of Newark Bay for many years (R. 31, 41-2, 47-8).

going on in the vicinity of Bergen Point, and the absence of reliable charts and aids to navigation. Petitioner's superintendent agreed to take the risk, relying on Captain Fort, who had previously acted for him as pilot* (R. 35, 48, 76).

The *Sabine Sun* then proceeded under her own steam (using her own propelling power) to Bergen Point and made the usual turn—about 90° to starboard—into Newark Bay with the assistance of the three tugs. While proceeding up the Bay on the usual ranges† about 3:30 P. M., the steamer struck an obstruction on the bottom and remained fast. Cargo was lightered from her forward tanks and she then proceeded to her destination about 6 P. M. (R. 17, 55).

There were no reliable charts of the vicinity and no established aids to navigation other than Bergen Point Light. A number of other steamers have struck obstructions on the bottom in the same vicinity (R. 33-4, 36, 57-60).

The Contract Between the Parties

The "pilotage clause," which was a part of the contract between the parties, provided as follows:

"When the captain of any tug furnished to or engaged in the service of assisting *a vessel which is making use of her own propelling power* goes on board said vessel, or any other

* Turnbull at first testified that he did not remember any conversation with the pilot (R. 26). Later he denied that he had had any conversation with the pilot having to do with the character of the channel and the dangers and risk to be incurred (R. 27-8). Although the District Court found it unnecessary to pass upon this conversation between the pilot and Turnbull, the language of the opinion indicates that the Court believed that it did take place (R. 77). Turnbull also denied knowledge of the "pilotage clause", but both the Courts below found against him on this issue (R. 78, 89).

† The usual ranges consisted of a gas tank and a street on Staten Island. The pilot since used the same ranges with vessels of the same and greater draft and at the same stage of the tide, without accident (R. 33-4, 36, 59-60).

licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel *assisted* in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom (Exhibit C; R. 67-8, 86).

As usual in cases of this kind, the order for tugs consisted merely of a telephone request by petitioner's superintendent, accepted by respondent's office representative, to send tugs to *assist* in *berthing* the steamer which was making "use of her own propelling power" at a certain time and place. Nothing was said about a pilot, but petitioner's superintendent (Turnbull) understood that one of the tugboat captains would come up on the steamer's bridge and take charge as pilot (R. 24-5, 29). The parties had previously done business on this basis and the full terms of the contract must be spelled out from the previous dealings between the parties (R. 85-7).

Laches

No claim was made in behalf of petitioner against respondent, nor was any intimation received by respondent that there would be any claim of liability against respondent until nearly a year after the accident (R. 49-50).

Although a survey of the damage to the steamer was held shortly after the accident, no notice of survey was given to respondent, nor was respondent afforded an opportunity of attending upon the survey (R. 49).

District Court Opinion

Petitioner contended below that the "pilotage clause" was not a condition of the contract between petitioner and respondent and that Turnbull (petitioner's superintendent) had no knowledge that the clause was a condition of the engagement of the tugs.* On this question of fact the District Court found against petitioner, saying:

"Copies of respondent's 'Pro Forma Towage Rates and Contract with Dalzell Towing Company, Inc.', containing the above quoted clause, were forwarded to libelant's office on November 15, 1923, December 28, 1923 and June 10, 1924, in response to inquiries concerning towage charges. One of such copies was received by Mr. Innis, a clerk in libelant's office; another by the office manager of libelant's marine office; and a third by Mr. Turnbull himself. In a letter which accompanied the rate schedule which was sent to libelant and received by Innis, the respondent said:

> 'We are attaching herewith a towage schedule and would like to call your attention to the last paragraph marked with an "X".'

This reference was to the pilotage clause set out above.

"Respondent usually handled the vessels of libelant in this port, and inasmuch as the pilotage clause is printed on the bills for services rendered by respondent, to say nothing of the attention which was drawn to the clause by respondent's letter, there can be no doubt that libelant should be charged with knowledge of the terms on which respondent offered to furnish towing services" (R. 78).

Circuit Court of Appeals Opinion

The Circuit Court of Appeals found also that "the contract between the parties included the 'pilotage clause' as one of its terms" (R. 87).

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* The same contention is made in this court (Brief, p. 12).

The Court referred to *The Syracuse,* 12 Wall. 167, and *The Wash Gray,* 277 U. S. 66, relied upon by petitioner (Brief, p. 14), and pointed out that those cases involved *towage* (dead vessel—without steam), whereas the instant case was one of a vessel using her own propelling power, saying:

"* * * a distinction may well be taken between a towage contract as such and a pilotage contract. * * * But when the 'assisted vessel' is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot (*The Sarnia,* 261 F. 900 (C. C. A. 2)) and no limitation of liability of the tug owner. We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: 'I will furnish a man believed to be competent but you must assume the risk of his errors'" (R. 88-9).

III.

Argument

Summary of Argument

We shall argue that:

1. The contract between the parties included the "pilotage clause" as one of its terms.

2. The contract was not for "towage" but to *assist* a vessel with steam, *i. e.,* under her own propelling power.

3. The "pilotage clause" is valid.

4. The tug captain (pilot) was the servant of the petitioner pursuant to the terms of the "pilotage clause."

5. The manœuvre was a dangerous one and the accident was not due to negligence.

6. Petitioner assumed the risk of the manœuvre.

FIRST POINT

THERE WAS AN EXPRESS CONTRACT BETWEEN THE PARTIES AND THE "PILOTAGE CLAUSE" WAS PART OF THE CONTRACT.

Both the District Court and the Circuit Court of Appeals found as a fact that the pilotage clause was a part of the contract between petitioner and respondent (R. 78-79, 85-87). This was not disputed on the petition for certiorari.* But it is now disputed (Petitioner's Brief, Point I).

Respondent's schedule of rates, which contains the pilotage clause,† was sent to petitioner on three occasions and admittedly received (R. 86-7).

First, on November 15, 1923, to its office at Philadelphia in answer to petitioner's letter of November 14, 1923 (Exhibits A and B, R. 63).‡

Second, on December 28, 1923, the rate schedule, including the pilotage clause, was mailed to petitioner's office at Marcus Hook, Philadelphia, in answer to petitioner's letter of December 27, 1923 (Exhibits E and F, R. 69-70). The District Court and Circuit Court of Appeals so found (R. 78, 86).

Third, on June 10, 1924, the schedule, including the pilotage clause, was again sent to petitioner at its office at Marcus Hook in answer to petitioner's letter of June 6, 1924 (Exhibits G and I, R. 70, 72). The District Court and Circuit Court of Appeals so found (R. 78, 86).

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* See Petition, Reasons Relied on for the Allowance of the Writ, pages 7-8; also Brief in support of petition, Summary of Argument, pages 11-12.

† Quoted at pages 4-5 of this brief.

‡ On this occasion particular attention was called to the "pilotage clause", the last paragraph of the enclosure (contract and schedule of rates), was marked with the letter X in order that there could be no misunderstanding as to it (Exhibit B, R. 63-4). The District Court so found (R. 78).

Petitioner received further notice of the pilotage clause, which was printed on all of respondent's bill heads, where the clause conspicuously appears on the face of the bill (Exhibits D and H, R. 69, 71). No one with the bill before him could fail to see the clause, any more than one could fail to see the pilotage clause in the schedule of rates (Exhibit C, R. 64). Indeed, petitioner's superintendent (Turnbull) admitted that he had one of respondent's bills with the "pilotage clause" before him when he was questioning the amount of one of respondent's charges for tugboat service, which led to the writing of his letter of June 6, 1924 (Exhibits G and H, R. 70, 71), and he was forced to admit that he saw respondent's invoices "right along".

"Q. Mr. Turnbull, you are familiar with these invoices of *Dalzell's?* A. Yes, sir.

Q. I show you an invoice which was the subject of some correspondence between you and *Dalzell.* I think you will find that that invoice is the subject of that correspondence, referring to your letter of November 26, 1924, marked Exhibit G. Do you remember that? A. Yes sir.

Q. *You see those invoices right along, don't you?* A. Yes, sir" (R. 19).

Although he claimed that he did not remember "reading it" (pilotage clause), he admitted that he had "heard of it" and *"seen it"*. To use his own words:

"Q. Just look at the bottom of this invoice there to which you refer in your letter, where you are quarrelling with the invoice. You had that notice before you at the time you wrote the latter. Do you see the clause at the bottom of the invoice? A. Yes, sir.

Q. What does that say? A. I have read it.

Q. You have read it? A. I have read it now, yes sir. But *I never remember reading it before.*

Q. This is the first time you have ever heard of it, is it not? A. *I heard of it, but it is the first time I have ever seen it to read it"* (R. 20).

"I would not say that I had never seen it (pilotage clause), but I will say that *I never read it"* (R. 22).

Counsel for petitioner assert that the schedule of rates was mailed "to employees of Sun Oil Company (petitioner) in response to their inquiries about towing rates and charges for past towage services" (Petitioner's Brief, pp. 2-3).

By the above statement and following argument petitioner would have this Court believe that only subordinate employees of petitioner had knowledge of the pilotage clause. This is directly contrary to the findings of both the District Court and Circuit Court of Appeals (R. 78-9, 86-7).

Petitioner attempts to avoid the effect of the pilotage clause by asserting that when its marine superintendent telephoned respondent for tugs to assist its steamer to her berth on this occasion, it had nothing to do with the contract between petitioner and respondent, and that the request (offer) to engage tugs was not at the rates quoted in the schedule of rates which petitioner had received from respondent (Brief, p. 11). Then what rates? There was no mention in the telephone conversation as to amount to be paid for the services of the tugs, nor was any request made for a pilot to take charge of the manœuvre (R. 14-15, 85). These and other terms and conditions of the tugboat assistance were contained in the schedule of rates (Exhibit C, R. 64-8).

By this document (and its bill heads) respondent notified its customers of the terms and conditions under which it does business. By ordering tugs after the receipt of notice of these terms and conditions, petitioner assented to these terms and they were incorporated into the oral contract. The procedure followed was not new to any of the individuals involved. It is what petitioner's superintendent, Turnbull "expected" and the same as had occurred on previous occasions (R. 25). There is absolutely nothing in the record concerning any other rates. The *only* rate referred to is the rate given in the contract and each time respondent's charges were

questioned by petitioner, a copy of the schedule of rates (Exhibit C) was enclosed with respondent's reply for petitioner's further information. Indeed, the letters exchanged between petitioner and respondent, concerning respondent's bills for services, clearly show that the charges for services were at the definite rates stated in the schedule (Exhibits A, B, C, E, F, G and I, R. 63-72).

It is a quibble to contend (Petitioner's Brief, pp. 11-12) that petitioner was not notified that the terms of the contract were the *only* terms on which tugs would be furnished. When respondent offered to do business *upon the terms contained in its schedule* of rates and contract, petitioner had no reason to believe that respondent would do business under any other conditions, unless other conditions were later agreed upon. Both the lower courts so found (R. 78, 87).

Notwithstanding the above findings by the District Court and Circuit Court of Appeals, counsel for petitioner still contend that Turnbull had no knowledge that the clause was a condition of his engagement of the tugs, and that there was no meeting of the minds. However, both Courts below have found that petitioner's superintendent (Turnbull) did have knowledge of the clause. As the Circuit Court of Appeals said:

"Whether he (Turnbull) had actually read the clause and whether it was in his mind when he telephoned the order for tugs for the *Sabine Sun* is quite beside the point. The meeting of the minds of the parties to a contract is not determined by a subjective test. Mr. Turnbull's offer on behalf of the libelant, which the respondent accepted, must be interpreted in the sense in which the party using the words should reasonably apprehend that they would be understood by the other party. 2 Williston, Contracts, § 605. Knowing that the respondent had a schedule of rates and a pilotage clause, the importance of which had been stressed not only in the letter of November 15, 1923, but also by printing it on its billheads, the libelant should reasonably apprehend that its

telephone order for tugs would be understood by respondent as a request that they be furnished upon its customary terms as to rates and pilotage. The court below rightly held that the contract between the parties included the pilotage clause as one of its terms" (R. 86-7).

SECOND POINT

THE CONTRACT WAS TO FURNISH TUGS TO "ASSIST" A STEAMER UNDER HER "OWN PROPELLING POWER", NOT FOR TOWAGE.

The courts below found that the contract here was not for "towage" but for "assistance" (R. 88-9).

Towage has recently been defined by this Court in *Stevens* v. *White City*, 285 U. S. 195, as follows:

"The supplying of power by a vessel, usually one propelled by steam, to tow or draw another is towage. Many vessels, such as barges and canal boats, have no power of their own and are built with a view to receiving their propelling force from other sources. And vessels having motive power often employ auxiliary power to assist them in moving about harbors and docks. *Benedict on Admiralty*, 5th ed., § 100" (p. 470).

In *Ryan* v. *Hook*, 34 Hun (N. Y.) 185, the Court said:

"'Tow' means to drag a vessel forward in the water by means of a rope attached to another vessel, and implies that the act is done by those on board of the latter" (p. 191).

The instant case does not involve "towage". There was nothing in the contract, either expressed or implied, that respondent agreed to *tow* petitioner's steamer (*Sabine Sun*). On the contrary, the steamer was admittedly under her own steam, *i. e.*, "making use of her own propelling power" and tugs were furnished to *assist* a steamer which was being operated entirely by her own machinery, viz., her master, officers and crew were at their stations, her own propelling power was being used and she was being steered by her own steering apparatus (R. 25, 29, 32, 86-7).

The contract as customary was made by telephone conversation between petitioner's and respondent's representatives (R. 14, 85). The telephone conversation consisted merely of a request for tugs to *assist* the *Sabine Sun,* under her own steam, to a berth (R. 14-15, 25, 32). Petitioner's superintendent intended the *Sabine Sun* to propel herself through the water by the use of her own propelling power, which intention excludes the possibility of towage. The steamer was able to propel herself to her destination and required no tugs to convey or transport her. What she needed was tug assistance in making turns in the channel and the turn from the channel to her berth, Tugs could, for example, push her sidewise, or push her bow in one direction and her stern in another, in making bends. It was assistance of this kind, not towage, that petitioner ordered.

However, it is apparent that counsel for petitioner have confused a dead ship with a vessel under her own propelling power. Repeated references are made in petitioner's brief to the "towage service" and the "contract to tow or take" (Brief, pp. 9, 10, 11, 12, 21, 28). In the discussion on page 13 following the quotation from the pilotage clause, petitioner omits any reference to the following important words: "which is making use of her own propelling power." This omission is probably in accordance with petitioner's erroneous assumption that this was a "towage" case. That we are right in this is apparent from the fact that in the following paragraph in petitioner's brief (p. 14) reference is made to *The Syracuse, The Wash Gray, The Oceanica,* and other towage cases which do not involve vessels using their own propelling power.

Petitioner's counsel seem to believe that there is no difference between handling a vessel under steam (using her own propelling power) and handling a dead ship (without steam) (Petitioner's Brief, p. 21).

The difference is vital—entirely different principles are applicable. In one case (towage, *i. e.,* handling a vessel without steam) the vessel is without motive power and completely under the control of the towing tug or tugs, and the owner of the vessel towed has a maritime lien on the tugs for damage sustained as a result of any error or negligence on the part of the tug captain in charge.

Sturgis v. *Boyer,* 24 How. 110;
The Express, 52 Fed. 890 (C. C. A. 2);
Central Wharf Towboat Company v. *Furness Withy,* 269 Fed. 950 (C. C. A. 1).

In the other case (with steam) the steamer is in charge of her own movements, *i. e.,* she is using her own propelling power, and is being *assisted* by tugs only when necessary, as ordered from the steamer's bridge, and there is no maritime lien on the tugs for errors of the pilot in charge.

In *The Sarnia,* 261 Fed. 900 (C. C. A. 2) the Court said:

"The tug *Palmer* committed no fault, and when Barrett furnished the *Sarnia* with a pilot in the person of Capt. Slauer, he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on the *Sarnia's* bridge and managing that steamer *with her own steam*" (p. 901).

Where the vessel is "with steam" the "pilotage clause" is applicable; where "without steam" it is a case of towage and the clause is not applicable.

As the Circuit Court of Appeals said:

"But when the 'assisted vessel' is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot [*The Sarnia,* 261 F. 900 (C. C. A. 2)] and no limitation of liability of the tug owner" (R. 89).

Whether or not a lien arises is of real importance. In the case of a tow without her own propelling power, a lien arises

and the marine insurance on the tug protects the tug owner. Where the steamship uses her own propelling power and no lien arises for the pilot's negligence, the tug owner's marine insurance does not protect him. This practical business consideration is the reason for the existence of the "Pilotage Clause". The tug owner cannot afford, uninsured, to take the risk. The possible damages involved are too tremendous and as the Circuit Court of Appeals pointed out, the tug owner might be wiped out by one accident (R. 89).

It will be seen, therefore, that the situation is not analogous to and has nothing in common with the "towage" cases such as *The Syracuse,* 12 Wall. 167, *The Wash Gray,* 277 U. S. 66, and the other cases referred to in petitioner's brief (pp. 14-21). In those cases, the vessels were not being navigated—they were *without steam* and not using their own propelling power—they were entirely under the control of the towing vessel, viz., they were being towed. In the instant case, petitioner's steamer at no time was being towed; she was at all times using her own propelling power. The tugs were not there to *tow* but to *assist* the steamer as ordered from the steamer's bridge by the pilot in charge (R. 25, 46-7, 88-9).

Nor is *The Georgia,* 31 F. (2d) 759 (Petitioner's Brief, p. 22), in point. In that case the steamer (under her own steam) was passing through Blackwell's Canal into the Great Lakes. A tug was engaged to *lead* the steamer through the canal. While so proceeding, led by the tug, the steamer was jammed between vessels moored on one side of the canal and the other bank. The owner of the steamer (libellant) claimed that the tug was at fault for

"leading the *Wickwire* (steamer) into a position where the width and depth of the channel were insufficient to permit her to pass between the *Toledo* and the invisible channel; * * *" (p. 760).

The Court held the tug at fault in this respect, saying:

"I find the steamtug *Georgia* was primarily and solely at fault for the wedging in question and resulting damage, * * *" (p. 761).

The question in the instant case was not even before the Court, as there is no contention here that any of the tugs assisting the *Sabine Sun* was guilty of fault (Petitioner's brief, p. 2).

It is also argued in behalf of petitioner that the agreement to furnish tugs to assist the *Sabine Sun* to Bayonne was really a contract to transport; that the service was towage notwithstanding the steamer's engines and steering apparatus were operated by her crew, and that the steamer's engines were "assisting the towing company" (Brief, pp. 21, 22).

If the ship's engines are to be considered as assisting the towing company, does the towing company pay for the fuel oil consumed? Would the vessel owner keep steam up and use its own fuel oil at its own expense if it were the towing company's task to provide the propelling power? The answers to these questions are necessarily in the negative.

It must be conceded that the steamer was either being towed or she was under her own steam. In other words, it is either a case of towage or a vessel using her own propelling power. It cannot be both. She certainly had steam on her engine and was "making use of her own propelling power", which brings her directly within the wording of the "pilotage clause" and the situation intended to be covered by that clause (R. 25, 32, 34).

Petitioner even suggests (Brief, p. 22) that respondent did not appreciate the difference between "assisting" and "towing". Petitioner is mistaken. Respondent's contract provides for charges at a different rate for the two classes of

service. One for "docking and/or undocking vessels" (with steam) and another for "transporting vessels" (towage) (R. 64-5). Petitioner knew this, as appears from the bills (Exhibit D). For example, on October 11, 1923, the charge with reference to the *Sabine Sun* "no steam" was at the rate of $12.50 per hour, and on October 14 the charge with respect to the *Sabine Sun* "with steam" was $30 per tug (R. 68-9).

Furthermore, it is a matter of common knowledge that in situations of this kind the assisting tugs invariably attend either alongside or nearby the steamer until she arrives in the vicinity of her pier or the assistance of the tugs otherwise becomes necessary.

In *The Energy-Altamaha,* 1926 A. M. C. 917 (not reported in Federal), Ward, *J.,* said:

"The steamer was *under her own steam* and *attended* by the tugs *F. B. Dalzell* and *E. S. Atwood,* the master of the latter being on the bridge and in charge of the navigation" (p. 918) (italics ours).

In *The Wireless No. 1,* 290 Fed. 239, the Court said:

"* * * the steamer *West Henshaw,* which was moored at the south side of Morgan Street dock, backed out *under her own steam, assisted* by the steamtug *Nonpareil* on the port bow and the steamtugs *A. H. Mills* and *Anna J. Brooks* on the port quarter" (p. 240) (italics ours).

Petitioner goes one step further and after referring to the towage cases, makes the following statement:

"In the case at bar respondent agreed, at petitioner's request, to take the *Sabine Sun* to Bayonne. This constituted a contract to furnish tugs and crews, with a competent man in charge, and to use reasonable care to move the vessel. It is what both this Court and the Circuit Court of Appeals for the Second Circuit have classed as a towage service" (Petitioner's Brief, p. 19).

In support of the above statement petitioner refers to *Sacramento Navigation Co.* vs. *Salz,* 273 U. S. 326, 328, and *The Mercer,* 297 Fed. 981. Neither of these cases is in point. They are distinguished at pages 24-25 of this brief.

In no case cited by petitioner has this Court or the Circuit Court of Appeals for the Second Circuit "classed" an agreement such as that before this Court as towage.

THIRD POINT

THE PILOTAGE CLAUSE IS VALID AND RELIEVED RESPONDENT FROM LIABILITY FOR DAMAGES SUSTAINED AS A RESULT OF THE STRANDING.

Petitioner gives no cogent reason for holding that petitioner and respondent were not free to make the contract which both Courts below found that they had made. A tug or a towboat company is not a common carrier. *The Steamer Webb,* 14 Wall. 406; *The Margaret,* 94 U. S. 494; *Transportation Line* v. *Hope,* 95 U. S. 297; *Graves* v. *Davis,* 235 N. Y. 315.

It is well established that parties dealing at arms length and free to contract or not, may provide against liability for negligence. In *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, this Court held valid a contract whereby an express messenger released his employer, Wells Fargo & Company, and the railroad on which he worked, from liability for negligence, saying:

"There being no statute regulating the subject, it is settled by the decisions of this court, and is recognized in other jurisdictions, that the messenger's agreement was a valid and binding contract whereby Taylor agreed to assume all risk of injury incident to his employment, from whatever

cause arising, assented to the contractual arrangement between the two companies in respect of such injuries, and became obligated to the express company to refrain from asserting any liability against it or the railroad company on account of any such injuries" (pp. 188-9).

This Court reached the same conclusion concerning a contract between a railroad and a construction company in *Santa Fe Rwy.* v. *Grant Brothers,* 228 U. S. 177; again with respect to a lease between the owner of a cold storage warehouse and a railroad in *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul Rwy. Co.,* 175 U. S. 91; and with respect to an express messenger in *Baltimore & Ohio, etc., Rwy.* v. *Voigt,* 176 U. S. 498. In *McCormick* v. *Shippy,* 124 Fed. 48 (C. C. A. 2) referred to by this Court in *Santa Fe Rwy.* v. *Grant Brothers, supra,* at page 192, the Circuit Court of Appeals said, with respect to a clause in the charter of a yacht which provided "that the charterer shall assume no responsibility for loss or damage to the yacht":

"There is no question of public policy involved in this charter party, as in the case of a common carrier. It is well settled that the parties in such a case have the right to provide by apt language against liability for negligence" (p. 51).

No reason of public policy requires that the pilotage clause be declared invalid. Indeed, public policy requires that the right to contract freely be maintained. In *Baltimore & Ohio, etc., Rwy.* v. *Voigt,* 176 U. S. 498, this Court said:

"At the same time it must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare. It was well said by Sir George Jessel, M. R., in *Printing &c. Co.* v. *Samp-*

son, L. R. 19 Eq. 465: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract'" (pp. 505-6).

The reasons usually advanced for declaring invalid a provision in a contract whereby one party seeks release from liability for his negligence are two-fold, first, that such a release is an incentive to negligence, and second, with respect to carriers, that the parties do not deal on an equal footing. But the "pilotage clause" is no incentive to negligence because individual liability of the pilot for his own negligence remains and is a sufficient incentive to due care on his part. In *The China,* 7 Wall. 53, this Court said with respect to a pilot:

"If there be any default on his part, the owner has the same remedies against him as against other delinquents on board" (p. 67).

Furthermore, petitioner and respondent dealt at arms length on an equal footing. Respondent had no monopoly of the tug boat business in New York harbor and petitioner was free, if it chose, to engage tugs from a number of other companies, or if it desired, to attempt to negotiate a special contract with respondent. Furthermore respondent, not being a common carrier, was entitled to refuse to do business expect on its own terms, which terms as both courts below have found, included the pilotage clause.

In *Santa Fe* v. *Grant Brothers,* 228 U. S. 177, this Court said:

"The parties then were free to make their own bargain as to this transportation and the liability which would attach to it. There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made" (p. 188).

There is no principle of law which forbids an employer (respondent here) from informing parties with whom it contracts (petitioner here) that its servants are acting beyond the scope of their employment if and when they assume duties beyond the border of the property owned by respondent, and that its general servants are not its servants for the performance of particular acts, and that if its general servants undertake to perform such particular acts, they become for that purpose the servants of petitioner.

Standard Oil Co. v. *Anderson,* 212 U. S. 215, 220;
Denton v. *Yazoo & Miss. Valley Rld. Company,* 284 U. S. 305.

As the Circuit Court of Appeals said:

"We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: 'I will furnish a man believed to be competent but you must assume the risk of his errors.' If this cannot be done, the piloting company may readily be wiped out by a single disaster" (R. 89).

The pilotage clause was first passed upon (and upheld) in *The Nonpareil,* 1924 A. M. C. 312 (S. D. N. Y.).* The Court said:

"All harbor towing in this port of steam vessels *with steam* up is done on these terms * * *" (p. 318).

* Not reported in Federal Reporter.

The clause has since been upheld in the following cases:

The Wireless No. 1, 290 Fed. 239 (E. D. N. Y.);

The Niels R. Finsen, 52 F. (2) 795 (S. D. N. Y.);

The Hagood, 1925 A. M. C. 1646 (S. D. N. Y.)*;

The Energy-Altamaha, 1926 A. M. C. 917 (S. D. N. Y.)*;

McGirr's Sons v. *Mutual,* 1927 A. M. C. 382 (S. D. N. Y.)*;

The Watertown-Oran, 1930 A. M. C. 1523 (S. D. N. Y.)*;

Lee & Simmons Inc. v. *Peursum,* 1931 A. M. C. 699 (E. D. N. Y.)*;

Foreign Transport Co. v. *Moran, (The Margaret A. Moran),* 57 F. (2d) 143 (C. C. A. 2).**

In *The Pacific Maru,* 8 F. (2d) 166 (S. D. Ga.), a much broader clause than the one before this Court was passed upon and upheld, following an admirable discussion of the cases. The Court said:

"So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress. The contract of exemption from liability is valid. There was no need to offer an alternative contract at a different rate. Such requirement would violate the freedom of contract" (p. 173).

Counsel for petitioner rely upon *The Wash Gray (Compania de Navegacion* v. *Firemen's Fund Insurance Company),* 277 U. S. 66, and *The Syracuse,* 12 Wall. 167 (Brief, p. 14).

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* Not reported in Federal Reporter.

** The District Court decision is referred to at page 41 of petitioner's brief under the name *Allaguash,* 1930 A. M. C. 1981, the case was reversed by the Circuit Court of Appeals (57 F. (2d) 143).

In each of these cases the vessel towed was without her own propelling power—the pilotage clause was not involved. In *The Wash Gray,* the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. *S. S. Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who defended on the ground that the contract above quoted discharged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

Concerning the *The Wash Gray,* the Circuit Court of Appeals said in the instant case:

"If the opinion lays down only a rule of construction, it is too clear for argument that it does not apply to the pilotage clause in suit which indubitably expresses the intention to put upon the 'assisted vessel' the risk of the pilot's handling of her. If, on the contrary, the opinion lays down the rule that a towing vessel cannot release herself from liability for negligence, however clearly that intention be expressed in the contract of towage, a distinction may well be taken between a towage contract as such and a pilotage contract" (R. 88-9).

The Syracuse, 12 Wall. 167, involved a *towage* contract under which the owner of the tug agreed to bear the risks

of navigation, provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill (p. 170). This Court held that the steamboat was not navigated with ordinary care and skill and she was held at fault.

Petitioner would have the Court believe that the "pilotage clause" now before this Court (or a similar clause) has been held invalid by this Court and by other Courts (Petitioner's Brief, p. 16). This is not the fact. The "pilotage clause" before this Court has actually been passed upon *only* in the cases referred to at pp. 21-2 of this brief, and in each case it has been upheld.

In *Calzavaro* v. *Planet S. S. Corp.,* 31 F. (2d) 885 (C. C. A. 4) (Petitioner's Brief, pp. 15, 19), the contract between the parties included a similar clause, but the steamer was *not* under her own propelling power and the clause was *not* passed upon.

In *British Columbia* v. *Mylroie,* 259 U. S. 1 (Petitioner's Brief, pp. 18, 19), the parties agreed that the tug would render the barge "reasonable assistance from time to time in any emergency which might arise" and that the tug company "is not to be held liable for any damage which might happen to the said barge, *Bangor,* or its cargo, while in tow or at anchor" (p. 11). This Court held that the clauses of the contract seemed to be in conflict. They were reconciled by holding that the tug was not liable unless she should fail to render reasonable assistance to the tow in an emergency, and it was found that the tug did not render the assistance as required by the contract. This Court said:

"This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void" (p. 12).

Sacramento Navigation Co. v. *Salz,* 273 U. S. 326 (Petitioner's Brief, pp. 19, 21) is an affreightment case, involving

the Harter Act. The sole question was "whether the barge alone or the combination of tug and barge was the 'vessel transporting' the barley, within the meaning of the Harter Act" (pp. 327-8). *The Mercer,* 297 Fed. 981 (Brief, p. 19) is a salvage case and involves only the question whether services rendered to a vessel in need of assistance was salvage or towage.

All the other cases referred to in petitioner's brief (pp. 14-20) involved *towage,* viz., vessels *not* using their own propelling power, and, therefore, did not involve the pilotage clause.*

As for towage (not involved here), the situation is clearly stated by the Circuit Court of Appeals (R. 87-8). For the cases where the Courts have held that the tug owners may restrict their liability by special agreement, see:

The Oceanica, 170 Fed. 893 (C. C. A. 2); certiorari denied, 215 U. S. 599;

Ten Eyck v. *Director General,* 267 Fed. 974 (C. C. A. 2); certiorari denied, 254 U. S. 646;

Monk v. *Cornell Steamboat Company,* 198 Fed. 472 (C. C. A. 2);

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* The cases are: *The Steamer Syracuse* (1870), 12 Wall. 167, 171; *Compania de Navigacion* v. *Firemen's Fund Insurance Co.* (1928), 277 U. S. 66, 73-4; *The M. J. Cummings* (1883, N. D. N. Y.), 18 Fed. 178; *The American Eagle* (1893, D. C. Ohio), 54 Fed. 1010; *The Jonty Jenks* (1893, N. D. N. Y.), 54 Fed. 1021, 1023; *The Somers N. Smith* (1903, D. C. Me.), 120 Fed. 569, 576; *In re Moran* (1903, E. D. N. Y.), 120 Fed. 556, 558; *Alaska Commercial Co.* v. *Williams* (1904 C. C. A. 9 C.), 128 Fed. 362, 366; *The Edmund L. Levy* (1904 C. C. A. 2 C.), 128 Fed. 683, 684; *The Oceanica* (1906 W. D. N. Y.), 144 Fed. 301, 305; 170 Fed. 893; *The Monarch* (1916 D. C. Fla.), 235 Fed. 795; *Mylroie* v. *British Columbia Mills Tug & Barge Co.* (1920 C. C. A. 9 C.) 268 Fed. 449, 259 U. S. 1; *The Sea Lion* (1926 D. C. Cal.), 12 F. (2d) 124; *United States* v. *Norfolk-Berkley Bridge Corp., et al.* (1928 E. D. Va.), 29 F. (2d) 115, 118; *Graves* v. *Davis,* 235 N. Y. 315; *Ten Eyck* v. *Director General,* 267 Fed. 974; *The John G. Stevens,* 170 U. S. 113; *The Margaret,* 94 U. S. 494; *The Vim,* 40 F. (2d) 638.

Owen McCaffrey's Sons v. *Director General,* 282 Fed. 728 (S. D. N. Y.);
McCormick v. *Shippy,* 124 Fed. 48 (C. C. A. 2);
Long v. *Lehigh Valley Railroad Co.,* 130 Fed. 870 (C. C. A. 2).

In *Graves* v. *Davis,* 235 N. Y. 315, the New York Court of Appeals so held, saying:

"A tug is not a common carrier of the tow. The owners of a tug may restrict their liability by special agreement. No rule of public policy is involved. (*Wells & Tucker* v. *Steam Nav. Co.,* 2 N. Y. 204; *The Margaret,* 94 U. S. 494; *Hartford Fire Ins. Co.* v. *Chicago M. & St. P. Ry. Co.,* 175 U. S. 91, 98, 99). When the defendant gave notice on what terms it would furnish tug service, the charterer actually accepted such terms and entered into a special contract incorporating them when it ordered tow service without protest" (pp. 319-20).

FOURTH POINT

THE TUG CAPTAIN (PILOT) WAS THE SERVANT OF PETITIONER PURSUANT TO THE TERMS OF THE PILOTAGE CLAUSE.*

Respondent did not furnish a pilot to take charge of petitioner's steamer. It is not even contended by petitioner that

* It is interesting to observe the difference between the position taken by petitioner in the petition and brief for writ of certiorari, and the position now taken on this point. In the brief in support of the petition for writ of certiorari petitioner said:

"The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun* pursuant to respondent's contract" (p. 18).

In the brief now on file the sentence reads:

"The two tug captains were respondent's servants before they took charge of the movement of the *Sabine Sun*" (p. 24).

The words "pursuant to respondent's contract" are omitted. Apparently these words were omitted in order that petitioner could justify Point I of its present brief (pp. 10-12), which was not part of petitioner's case upon the application for writ of certiorari.

its superintendent ordered a pilot—he merely ordered tugs (R. 14, 25, 29-30, 85-6). There was no agreement on the part of respondent to furnish a pilot, and the "pilotage clause" of the contract is an express repudiation of any such intent. Respondent furnished tugs to *assist* the steamer and by the "pilotage clause" made it clear that it was beyond the scope of the employment of the tug captain to leave his tug and go aboard a steamer using her own propelling power and take charge. However, it was expressly provided that *if* the captain *did* leave his tug and go aboard the steamer, he became the servant of petitioner in respect to giving orders and handling the steamer (R. 67-8).

For the convenience of the Court we quote the part of the pilotage clause pertinent to the discussion under this point:

"When the captain of any tug furnished * * * goes on board the said vessel * * * it is understood and agreed that said tugboat captain * * * becomes the servant of the owners of the vessel assisted * * *" (Exhibit C, R. 67-8).

Petitioner contends that the relationship of master and servant did not exist because petitioner did not "choose" the pilot, and further, because the pilot went on the steamer's bridge "without consulting or being requested by petitioner," and one pilot was substituted for another during the voyage without consulting petitioner (Petitioner's Brief, pp. 24-25, 27).

This contention overlooks, certainly disregards, the facts, viz., it was necessary to have one pilot succeed the other, because the first pilot was not familiar with nor licensed for the waters further on (R. 47-8). As for choosing the pilot and requesting him to come on board petitioner's steamer, petitioner's superintendent (Turnbull) was in full charge

of the whole operation and admitted that he "expected" the tug captain (Fort) to come on board and act as pilot without being requested (R. 14, 24-5). There was no mystery about the matter and there was no reason for consultation as to the pilot. As the Circuit Court of Appeals said:

"Nothing was said about pilotage, but Mr. Turnbull (petitioner's superintendent) understood that his vessel would move under her own steam and that one of the tugboat captains would come upon her bridge and take charge as pilot. The parties had previously done business together, * * *" (R. 85-6).

Indeed, there could be no other conclusion from Turnbull's testimony. It is as follows:

"Q. Then you knew what the manœuvre was going to be, did you not? A. Yes sir.

Q. And that is what you came to New York for, was it not? A. Yes sir.

Q. About how many times before or since have you been on steamers in New York and proceeded with the vessel from anchorage ground or some other place to destination? A. That is very hard to answer.

Q. Well, about? A. Probably half a dozen times.

Q. Were they always under their own steam, as this vessel was? A. Yes sir.

Q. Always under their own steam? A. Yes sir.

Q. And did always a tugboat captain act as pilot and take charge? A. Yes sir.

Q. Always? A. Always.

Q. You knew this was going to occur on this occasion? A. Yes sir.

Q. It was not necessary for you to request one of the tugboat captains to act as pilot, was it? A. No sir.

Q. You expected that? A. Yes sir.

* * * * * * *

Q. This particular manœuvre was made in the same manner as other manœuvres had been made? A. Yes sir.

Q. As far as other tugboat captains coming on board and taking charge was concerned? A. Yes sir" (R. 24-5).

Petitioner's steamer was required to have a pilot to direct her navigation through the Kills and to her berth. The pilot could be anybody licensed to pilot in the waters traversed. He might be the ship master (which would be the case if he had a license for the waters), a Sandy Hook pilot,* a coast pilot, or any outside tug captain holding a proper license.

When Fort went on the steamer's bridge to act as pilot he became petitioner's servant under the pilotage clause, and if some question arose as between him (Fort) and petitioner, it was a matter to be disposed of between them, not between petitioner and respondent.

In *Standard Oil Company* v. *Anderson,* 212 U. S. 215, this Court said:

"One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation" (p. 220).

"It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of those to whom they are furnished" (p. 221).

Fort, while on the bridge of the *Sabine Sun* was under the exclusive control of the master of that vessel and petitioner's superintendent, both of whom were present. The master could have supplanted Fort at any moment, temporarily by countermanding any individual order, or permanently by directing Fort to leave the bridge. No representative of

* "* * * * A Sandy Hook pilot (Compulsory under Sec. 2119, c. 410, Laws of New York, 1882; *Homer Ramsdell Co.* v. *La Compagnie General Transatlantique,* 182 U. S. 406)".

respondent was present to direct Fort in the manner of doing the work or to instruct him whether or not he should proceed or stop.

In *The China,* 7 Wall. 53, this Court said with reference to a "compulsory" pilot,

"The master has the same power to displace the pilot that he has to remove any subordinate officer of the vessel. He may exercise it or not, according to his discretion" (p. 67).

See also:

Dampskibsselskabet Atalanta A/S et al. v. *United States,* 31 F. (2d) 961 (C. C. A. 5);

City of Los Angeles v. *Standard Transp. Co.,* 32 F. (2d) 988 (C. C. A. 9);

Robins Dry Dock & Repair Co. v. *Navigazione Libera Triestina, S. A.,* 32 F. (2d) 209 (C. C. A. 2);

Jure v. *United Fruit Company,* 6 F. (2d) 6 (C. C. A. 5).

In similar circumstances in *City of Los Angeles* v. *Standard Transp. Co., supra,* 32 F. (2d) 988 (C. C. A. 9), the court held that a pilot furnished by the City of Los Angeles became the servant of the owners of the steamship of which he took charge, even in the absence of a pilotage clause. In discussing how it determined whose servant the pilot was, the Court said:

"* * * The pilot was placed in charge of the *Seekonk* by the master and not by the law, and the rights and obligations of the parties must be determined by reference to the relation thus established. In the varied affairs of life it is not always easy to determine where responsibility rests for the act of a servant in the general service of one master but employed in the particular work of another. But the test almost invariably applied is: Whose was the work, and whose the power of control? *Guy* v. *Donald,* 203 U. S. 399, 27 S. Ct. 63, 51 L. Ed. 245; *Standard Oil Co.* v. *Anderson,*

212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480. While here, the pilot was in the general employ of the city, the work in which he was immediately engaged was the work of the ship or master, and the only control to which he was subject was the control of the master. The city was powerless to direct him in the discharge of his duties and was not present to discharge him from the particular service in case of negligence or incompetence" (p. 990).

So here, the work of navigating the ship was the work of the master of the ship and Fort, while on the bridge, was doing the master's work with the master's consent because he did not interfere. Respondent was powerless to direct Fort in the discharge of his duties and was not present to discharge him from the service in case of negligence or incompetence. Petitioner's shipmaster was present, however, and empowered by law to supplant Fort at will.

Although agreeing with the Court below that a "person who merely supplies a pilot" can "exempt himself from liability for the negligence" of the pilot so supplied, petitioner contends that this was "not merely a contract to supply a pilot", but "a contract to *move* a vessel with the aid of tugs, * * *" (Petitioner's Brief, p. 27).

But this was a contract to furnish tugs to *assist* a vessel "making use of her own propelling power" and manned by her own master, officers and crew as we have shown under Point II. As usual under the circumstances, one of the tug captains boarded the steamer and acted as pilot. It was for this reason that the "pilotage clause" was made a part of the contract between the parties *i. e.,* by the "pilotage clause", the towboat company represents to the steamship owner that it is beyond the scope of the employment of the tug captain to leave his tug and go aboard a steamship "using her own propelling power" and take charge, and a tugboat captain, who *does* leave

his tug and goes aboard a steamship "using her own propelling power" and takes charge, becomes the servant of the owners of the steamship for that purpose.

As the Court below (C. C. A.) said:

"The appellant (petitioner) argues that, even if the pilotage clause was a term of its contract with respondent, the case at bar was not brought within it, but the argument is wholly without merit. It is mentioned merely to indicate that it has not been overlooked" (R. 87).

That the pilot was petitioner's servant is further evidenced by the fact that petitioner paid him $15 for his services as pilot (R. 37).

Nor was this payment a mere gratuity, as contended by petitioner, citing *The Edward G. Murray,* 278 Fed. 895; *The Procida,* 243 Fed. 251, and *The Caspian,* 14 F. (2d) 1006 (Petitioner's Brief, p. 31). The "pilotage clause" was not involved in any of those cases. Respondent made no charge for the services of any pilot. In every instance respondent's charge was "per tug" (Exhibit C. R. 64-7).

The situation is precisely the same as in *Oriental Navigation Co.* v. *S. S. Watertown* (*The Oran*), *supra,* where the Court said:

"There was no written contract between the companies, and the agreement must be spelled out from the testimony, to which reference had been made, and from the usual practice in this harbor in similar transactions.

"In the case of the *Nonpareil,* 1924, A. M. C. 312, 318, Judge Ward said that

> 'All harbor towing in this port of steam vessels with steam up is done on terms'

substantially similar to those set out on the Olsen schedule of rates, as hereinabove quoted, and the Captain of the tug in charge of the operation is the agent of the owners of the steamer. Such, indeed, was the stipulation of the parties in the *Nonpareil*" (pp. 1524-5).

FIFTH POINT

THE PILOT (TUG CAPTAIN) WAS NOT NEGLIGENT

The pilot, Captain Fort, captain of the tug *Fred B. Dalzell, Jr.*, had been piloting steamers in and out of Newark Bay for many years and was familiar with the channel around Bergen Point and the ranges (R. 37-9). No question is raised by petitioner as to his experience and competency as a pilot in the waters where the stranding occurred but he is charged with negligence because he failed to succeed. In making this charge petitioner overlooks the conditions which existed in the vicinity at the time and the danger of the manœuvre, as we shall show. Furthermore, counsel for petitioner have erroneously stated the law applicable. They assert that pursuant to the undertaking in the instant case,

"the law imposed a duty on it (respondent) not to cause injury to the *Sabine Sun*, either through its tugs, captains, or crews" (Brief, p. 8).

In the following paragraph of petitioner's summary another misstatement of the law will be found. It is as follows:

"The man furnished by respondent to take charge was bound to know * * * how to direct the movements *successfully.*"

On the following page (paragraph numbered 6) petitioner asserts that the law

"imposes upon a towing company a duty not to cause injury to the vessel which it has contracted to transport from one place to another " (Brief, p. 9).

As we have shown, this is not a case of towage, but even if it was, the above are not correct statements of the law

applicable to towage, which has been recently restated in *Stevens* v. *White City,* 285 U. S. 195, 1932 A. M. C. 468, where this Court said:

"Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. And it is established here and by numerous rulings of lower federal courts that evidence showing a tug's receipt of a tow in good order and delivery in damaged condition raises no presumption of negligence.

* * * * * * *

"While respondent was not an insurer or liable as a common carrier, it owed to the owner of the *Drifter* the duty to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. The burden was upon petitioner to show that the loss for which he sought recovery was caused by a breach of that duty. The mere fact that the *Drifter* was in good order when received by respondent and in damaged condition when delivered does not raise any presumption of fault" (p. 202).

DANGER OF THE MANŒUVRE

The manœuvre was a difficult task at this particular time, because blasting and dredging was going on in the vicinity; there were drills in the way; the channel was not marked, and there were no reliable charts of the vicinity in its then condition. At the time of this accident there was so much work of blasting and dredging going on in the vicinity that the United States Engineers would not vouch for the Government charts. There were no aids to navigation and the only guide for navigating was the natural ranges on the adjacent land, which the pilot used, to wit: a gas tank and Street on Staten Island, the ranges he had used before and since without mishap (R. 33-4, 37-8, 40).

Because of the danger due to local conditions the tug captain (pilot) took soundings in the vicinity of Bergen

Point on the day before. He also called upon the U. S. Army Engineers and made every effort to obtain the latest information concerning the deepest water in the vicinity and the obstructions on the bottom (R. 33, 35, 42-3, 76). As Captain Fort testified:

"It always has been a very difficult channel to navigate from Port Richmond up to the light, or if you go down the Sound to Shooters Island. It is narrow, rocky on both sides and treacherous tides. They were dredging and mud digging, and there were drills in the way, and tows to meet, and a very narrow space to navigate the vessel. * * * You had very few channel markings there, some of the channels were not marked at all. * * * There was no reliable chart of that district from Port Richmond up, because the engineers would give us a chart, but they would not vouch for it, they would say that that was the best they could do" (R. 33).

The expert called in behalf of petitioner admitted that there were no aids to navigation established by the Government and that it was necessary to "use your own". He testified:

"Q. You didn't do your navigation by any aids established by the Government? A. Well, no.
Q. There weren't any? A. No.
Q. You had to use your own? A. Yes" (R. 59-60).

We do not know how many other vessels struck obstructions in this vicinity while the blasting and dredging operations were going on, but the record shows nine other casualties, and in each case the vessels were in charge of experienced pilots. The steamships *Franklin K. Lane* and *Cerro-Azul,* also Captain Reynolds, an experienced pilot (name of steamer not given) "struck something two or three times in the vicinity"; Captain Slauer, another experienced pilot, had misfortune there; also Captain Rex, and another pilot whose name the Court stenographer omitted to transcribe (R. 57).

Indeed, petitioner's expert, Fountain, admitted "the same thing might happen to me", "maybe I have been lucky" (R. 57).

In the last analysis, therefore, there is only one fair conclusion and that is that the pilot of the *Sabine Sun* did his best with what he had, but this accident occurred in spite of his efforts, just as other experienced pilots in charge of other steamers navigating these same waters under these conditions struck obstructions on the bottom at about the same place.

Although conceding that the *Sabine Suns'* pilot on this occasion took "preliminary precautions" to ascertain the best way to get the vessel in under the conditions, petitioner now asserts that he "made no use of" these precautions and proceeded to navigate by some "haphazard" shore range, and that "no excuse" was made for his manœuvre (Petitioner's Brief, pp. 34, 35).

But the so-called "hapzard" shore range was the same one used by petitioner's expert. In other words, because of the absence of Government aids to navigation and reliable charts, these pilots were forced by conditions to "use their own", and they were using the same range (R. 33-4, 36-8, 59-60).

Petitioner's counsel now assert that "there is not a scintilla of evidence that any of the alleged difficulties contributed to the stranding of the *Sabine Sun*". They even criticise the pilot's testimony that the chart of the vicinity was not reliable, asserting "there is no evidence of this other than his bare statement" (Brief, p. 36). Well, why did not they produce testimony that the chart *was* reliable? Their own expert agreed that there were no Government aids to navigation, that he had to rely upon shore ranges of his own choosing, *i. e.*, "use his own", and that he was

"lucky" that the same thing had not happened to him (R. 57, 59).

Indeed, we submit that the fact that 8 or 9 other steamers, in charge of competent pilots, struck in this vicinity is a real illustration of the difficulties and dangers to be encountered in the vicinity at that time.

In *The Primrose,* 42 F. (2d) 827 (C. C. A. 2) (Petitioner's Brief, p. 37), the Court said:

"The evidence showed frequent groundings of various barges in attempts to navigate and the grounding and injury of Mignaults barge *No. 6* at practically the same place where *No.* 7 got into trouble. In such circumstances there is not the usual probability arising from a stranding that the Cornell tug was towing her barge negligently and taking her outside the channel as marked" (p. 828).

See also

United States v. *Jacksonville Co.,* 18 F. (2d) 39 (C. C. A. 5).

We have therefore an admittedly "dangerous" place where several other steamers, in charge of competent pilots, have had accidents because of the blasting and dredging going on and failure of the Government (up to that time) to provide aids to navigation or reliable charts of the vicinity. Clearly this is not a case to condemn a pilot who used all reasonable precautions to bring through his ship safely. Courts of admiralty often have stated their unwillingness to substitute the Court's opinion, with regard to precautions to be taken, for the opinion of an experienced navigator who is on the spot and who is charged with the duty of acting under conditions which he sees and which the Court cannot see.

In determining whether the pilot used reasonable skill and care, we must, as said in *The Harold,* 287 Fed. 757, "put our-

selves in his place, and divest ourselves of the knowledge that comes after the event" (p. 758).

In *The Eli B. Conine,* 233 Fed. 987, (C. C. A. 2) the Court said:

"'Lack of care under the circumstances', which is negligence, is rarely willful or reckless; it is usually error of judgment. But the converse is not true—that every error of judgment is negligence. The error must be measured by the standards of conduct and business knowledge furnished by the evidence and by experience of which even courts can take cognizance without direct testimony. If the error, viewed from that standpoint, is such as would not have been committed by a reasonable man, reasonably skilled in his occupation, it is negligence" (p. 988).

In *The Clarence L. Blakeslee,* 243 Fed. 365, (C. C. A. 2) the Court said:

"Navigators are not to be charged with negligence, unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown. *The Nannie Lamberton,* 85 Fed. 983, 29 C. C. A. 519. The line of demarcation between error of judgment and negligence is indicated in *The E. B. Conine,* 233 Fed. 987, 147 C. C. A. 661. *The Frederick R. Ives* (D. C.), 25 Fed. 447, shows facts quite like this case" (p. 366).

In *The Caspian,* 14 F. (2d) 1006; affirmed 14 F. (2d) 1013 (C. C. A. 3), the Court in a similar case said:

"The question hence becomes one of the exercise of the good judgment of a well informed mind. Our final finding in effect is that every proper precaution to inform themselves of conditions was taken by respondents, and that, under the conditions known, and which should have been known to them, it was good judgment to attempt to do what was done and there was no negligence in it" (1013).

In *The Southern Cross,* 1927 A. M. C. 457 (S. D. N. Y., not reported in Federal), six tugs were moving the steamship *Southern Cross* from Mariners Harbor, Staten Island,

to Pier 3, Hoboken. In the vicinity of Bergen Point the *Southern Cross* brought up on the bottom. The towboat company and the tugs were libeled. The Court (A. N. Hand, *J.*), in dismissing the libel, said:

"* * * I am not disposed to scrutinize too narrowly conduct of skilled navigators dealing with a most difficult problem *in extremis*" (p. 459).

See also

The Lafayette, 269 Fed. 917 (C. C. A. 2);
The Stifinder, 275 Fed. 271, 276 (C. C. A. 2);
The Frederick E. Ives, 25 Fed. 447 (S. D. N. Y.).

Counsel for petitioner *assume* that because these other vessels struck an obstruction in this same vicinity they were negligent (Petitioner's brief, p. 27). This is in accord with the general theory of petitioner's case, viz., that because this vessel struck an obstruction, negligence is proved. They are clearly in error. The burden is on libellant (petitioner) to prove negligence, which it has failed to do.

In *Dampskibsselskabet Atalanta* vs. *United States,* 31 F. (2d) 961 (C. C. A. 5), a steamship collided with two spur dikes extending from the bank of the river. The Court said:

"We may assume that a pilot is bound to have a high degree of skill and to use more than ordinary care, but, if he in good faith exercises sound judgment, it does not follow that he is guilty of negligence merely because the vessel in his charge unfortunately has an accident" (p. 963).

In *The Pacific Maru,* 8 F. (2d) 166 (S. D. Ga.), the Court said:

"Both sides agree that the burden is upon the libelant to prove its case, and that the duty of the libelee is not that of a common carrier, but to exercise the skill and diligence that a skillful mariner would exercise under like circumstances; the libelee not being responsible for errors in judgment, if such errors did not in themselves constitute negligence. It is true that the libelant contends that certain facts in this case, when proven, are in the nature of *res ipsa*

loquitur, and sufficient to place upon the libelee the burden of showing that diligence was exercised. The court, not being a mariner, and not versed in the duties of towing and in the effective forces of machinery, cannot be certain of its conclusion, but it is impressed with the fact that the criticisims leveled at the captain of the towboat are cases of hindsight, rather than foresight. The proper way to measure the diligence and the skill is, as far as possible, to visualize the conditions as they then existed, as to time, speed, and surrounding conditions of all kinds" (p. 173).

The Lizzie F. Walker, 3 F. (2d) 921 (C. C. A. 4) (Petitioner's Brief, p. 32), was a collision between a steamer and a tow in the Chesapeake. The quoted language from the opinion omits the words "after the collision", where the asterisks are. The quotation has nothing to do with the decision, and has no bearing upon the vessel being held at fault.

The Steamboat New World v. *King,* 16 How. 469 (Petitioner's Brief, p. 35), was a personal injury case. The quotation is part of a discussion on the degrees of negligence and can be of no assistance in deciding the instant case.

SIXTH POINT

Petitioner assumed the risk of the manoeuvre

As soon as the pilot came on the steamer's bridge he warned Turnbull (petitioner's superintendent) of the danger because of the blasting and dredging in the vicinity, lack of channel markings and absence of reliable charts. He testified:

"Q. When you got on the bridge did you have any conversation with Mr. Turnbull? A. As soon as I arrived on the bridge I informed Capt. Turnbull, or Mr. Turnbull, that there was considerable risk in going up to this dock, and asked him if he knew where he was going.

Q. Did you explain to him why you said that? A. I told him about the channel, how they were blasting and digging,

and the channel had changed very much, there were dredges and drills up there, and you didn't know what you might find, and also all the conditions of the tide * * *" (R. 34-5).

Turnbull was satisfied to rely on Fort and "take the risks". Fort testified:

"* * * he (Turnbull) said, 'I will take the risks.' He said, 'If we do as good as we did the last time I will be very much pleased,'" (R. 35).

Again:

"Q. Now, you say when you told Mr. Turnbull that this was a dangerous place, he said that he understood, he had been there with you before, and that you did well then, didn't he? A. He said he would depend on my judgment and if I did as good a job then as I did before, he would be satisfied" (R. 43).

"Q. I say, if you had any thought of not wanting to go ahead with the ship, if Mr. Turnbull had said that he wouldn't have taken the risk? A. If he hadn't taken the risk, I would have taken the ship back to anchorage.

Q. After you were under way? A. Yes, sir.

Q. Where were you when the conversation took place? A. Right off Port Richmond, three-quarters of a mile from the place where the ship touched" (R. 36).

This conversation between the pilot and petitioner's marine superintendent was confirmed by Captain Bennett, who was on the bridge at the time (R. 48).

Turnbull at first testified that he did not remember any conversation with the pilot, although he did remember that Captain Bennett remained on the bridge (R. 26-7). Later, he denied that he had any conversation with the pilot having to do with the character of the channel and the dangers (R. 27-8). The master of the steamer did not remember anything about it (see Exhibits 3 and 4, R. 62).

We have no doubt that the conversation took place. It was clearly testified to by Fort, confirmed by Bennett and at first only vaguely denied by Turnbull (R. 26-7). However, he also denied knowledge of the "pilotage clause" and both of the

Courts below found against him (R. 78-9). The District Court found it unnecessary to pass upon this conversation, but from the Court's language we should say the District Judge believed that it did take place (R. 77).

Counsel for petitioner even contend that Turnbull was "without authority" to agree to take the risk on behalf of petitioner, and that if he did have authority, it was "gratuitous", not supported by "any consideration" (Petitioner's brief, p. 42).

Clearly he had charge of the matter for his company, not only for this ship, but other ships of the petitioner company (R. 23-5). If Turnbull had "no authority" to make the agreement, there could hardly be anyone who did have authority. We cannot believe that an assistant marine superintendent under these circumstances has no authority to agree to what Turnbull agreed to on this occasion.

Merchants' Bank v. *State Bank,* 10 Wall. 604, 644;
Dysart v. *Missouri, K. & T. Ry. Co.,* 122 Fed. 228, 230 (C. C. A. 8);
Globe & Rutgers v. *Warner Sugar Refining Company,* 187 App. Div. (N. Y.) 492, 495.

This brings us to the contention that Turnbull's promise was "gratuitous", referred to in petitioner's briefs below as "without any consideration" (Brief, p. 42). We can hardly conceive of a better consideration than that testified to by the pilot, viz., that he would not have continued on. To use his own words:

"If he (Turnbull) hadn't taken the risk, I would have taken the ship back to anchorage" (R. 36).

As to this, counsel for petitioner contend

"Of course, Fort (pilot) had no right to take petitioner's ship back to where Bennett had first taken her in charge, either with or without a promise from Turnbull; and to have done so would have been a breach of respondent's contract to complete the job that had been commenced at Stapleton" (Petitioner's brief, p. 43).

A rather astounding contention, viz., that the pilot was *bound* to continue and *complete the job,* whether or not he considered it advisable to do so, and whether it was dangerous or not. The mere statement refutes itself. Indeed, it strikes at the very foundation of good navigation and the necessity for precaution. No navigator is "bound" to keep on against his judgment in the face of danger. It is well settled that a tug master is at fault for failing to go back in the face of danger.

In *The Edgar H. Vance,* 284 Fed. 56 (C. C. A. 9), the Court said:

"* * * we are clearly of the opinion that he (tug captain) was grossly at fault in failing to return the tow to her anchorage while he confessedly had the ability to do so, * * *" (p. 58).

In *The E. A. Packer,* 22 Fed. 668 (S. D. N. Y.), the Court (Addison Brown, *J.*) said:

"I am satisfied that the most prudent course, the bay being apparently clear below, was to do what the *Packer* did, with the evident concurrence of the libellant's captain, namely, to attempt to return" (p. 671).

How ludicrous it would be if all pilots boarding steamers were "bound" to "complete the job" regardless of danger ahead or weather conditions! We have found no case to support the contention. We note none is cited in petitioner's brief.

Moreover, as this Court said in *Standard Oil Co.* v. *Anderson, supra,* 212 U. S. 215, "the servant himself, is, of course, liable for the consequences of his own carelessness" (p. 220). See also

The China, supra, 7 Wall. 53.

If Turnbull had not assumed the risk, Fort was entitled to, and from the evidence he intended to, refuse to proceed as much in his own financial interest as in the interest of the safety of the ship.

SEVENTH POINT

Petitioner failed to prove its case

This is an ordinary case of failure of proof on the part of libellant (petitioner) as to both the tugs and respondent. Petitioner alleged particular acts of negligence against both respondent and the three tugs, viz., the *Dalzellite, W. F. Dalzell* and *Fred B. Dalzell, Jr.*

As to the tugs, the libel alleged that they were "carelessly and negligently navigated", "not properly manned and equipped", "they (tugs) failed to make due allowance for the tide", "they (tugs) did not keep the *Sabine Sun* under proper control" and "they (tugs) failed to keep the *Sabine Sun* in the ship channel and permitted that vessel to strand in shallow water, a duly charted obstruction" (R. 3).

Petitioner completely failed to prove *any* of these allegations. On the contrary, the only testimony in the record is that the tugs obeyed and executed *properly* all the orders given them and did everything required of them (R. 46-7). In fact, any fault on the part of the tugs has been abandoned on this appeal (Petitioner's brief, p. 2).

As to respondent, the libel alleges "In that the Dalzell Towing Company, Inc., furnished a pilot by reason of whose negligence in not giving proper directions to the tugs * * * and in not keeping the *Sabine Sun* in proper control, the stranding was due" (Libel, Art. 6, R. 3).

But petitioner failed to prove any negligence of the pilot, as we have pointed out above. On the other hand, if the pilot was negligent (which we deny) respondent Dalzell Towing Company is not liable, as he (pilot) became petitioner's servant when he went on the steamer's bridge and acted as pilot pursuant to the terms of the "pilotage clause".

LACHES

In conclusion we call the Court's attention to the failure of petitioner to explain, or excuse the failure to make any claim against respondent or against the tugs, or assert any negligence against them, until nearly *one year after the accident.* It is fair to conclude that if there had been any sincere intention at the time, of disputing the "pilotage clause" or Turnbull's agreement to assume the risk of the manœuvre, the respondent Dalzell Company would have been notified, or at least given an opportunity to attend upon the survey of the damage which is alleged in the libel to amount to $25,000 (R. 3-4, 49-50).

A similar situation existed in *Pan American* v. *Martin and Steamtugs Caspian and Adriatic* (*The Caspian*), 14 F. (2d) 1006; affirmed, 14 F. (2d) 1013 (C. C. A. 3). In that case the accident was on April 13, 1919. A survey was held April 19, 1919, without notice to the tugboat company (respondent) or the owners of the tugs (*Caspian* and *Adriatic*). A libel was filed about one year later, April 3, 1920. The Court said that the claim "may be fairly characterized as a stale one" (p. 1011), and dismissed the libel.

CONCLUSION

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

CHAUNCEY I. CLARK,
Counsel for Respondent.

Dated, New York, November 7, 1932.

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1932.

Sun Oil Company, Petitioner, *vs.* Dalzell Towing Company, Inc. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 5, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

This is a suit in admiralty brought by petitioner in the southern district of New York against respondent and three steam tugs, Dalzellite, W. F. Dalzell, and Fred B. Dalzell, Jr., to recover damages alleged to have been caused by their negligence to petitioner's tank steamer Sabine Sun. The court dismissed the libel. 48 F. (2d) 598. Petitioner appealed from so much of the decree as dismissed the libel as to the towing company. The Circuit Court of Appeals affirmed. 55 F. (2d) 63.

Respondent operates steam tugboats in and about New York harbor. May 14, 1925, in anticipation of the arrival of the Sabine Sun, Turnbull, petitioner's assistant marine superintendent, arranged by telephone to have respondent send tugs to take her through waters leading to Newark Bay and to a dock at Bergen Point, New Jersey. There was no writing or formal contract concerning the service to be rendered. The agreement pieced out from the oral order and acceptance and prior like transactions between the parties included as one of its terms the following clause: "When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom".

On the next day the tanker anchored off Stapleton, Staten Island. The W. F. Dalzell came alongside and Bennett, her cap-

tain, went on board and acted as pilot. Using her own power and accompanied by the tug she got under way. The Dalzellite joined them off St. George and thence the three vessels went on through the Kill van Kull. Off Port Richmond the Fred B. Dalzell, Jr. became part of the flotilla. Fort, her captain, then went upon the tanker and acted as pilot, relieving Bennett. The tanker's captain, his third officer, a quartermaster and Turnbull were also there. She continued on her way using her own propelling power and assisted by the tugs. When rounding Bergen Point she went aground outside the channel, and it was then, as alleged in the libel, that she sustained the damages for which petitioner seeks to recover. She was backed off the obstruction, turned into the channel and without other mishap taken to the dock.

In view of petitioner's failure to appeal from the dismissal as to the tugs, we must assume that as to them petitioner failed to make out its case and that the stranding of the tanker was not in whole or in part due to any fault of theirs. It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power. Her master, officers and crew were at their stations, and her propelling power and steering apparatus were used to bring her to destination. And if the pilotage clause is valid, the tug captains while on board the tanker and respectively acting as her pilot were for that turn the servants of petitioner and the respondent may not be held responsible for any act or omission of theirs during the period of that service.

The validity of its applicable provision cannot reasonably be doubted. So far as concerns the service to be rendered under the agreement, respondent was not a common carrier or bailee or bound to serve or liable as such. Towage does not involve bailment, and the services covered by the contract were less than towage. *Stevens* v. *The White City*, 285 U. S. 195, 200. There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their capacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence. *Railroad Company* v. *Lockwood*, 17 Wall. 357. *Liverpool Steam Co.* v. *Phenix*

Ins. Co., 129 U. S. 297, 440. Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. "There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made". *Santa Fe Railway* v. *Grant Brothers*, 228 U. S. 177, 188.

Respondent's responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage. The provision that its tug captains while upon the assisted ship would be the servants of her owner is an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former. *Denton* v. *Yazoo & M. V. R. Co.*, 284 U. S. 305, 308. It would be unconscionable for petitioner upon occurrence of a mishap to repudiate the agreement upon which it obtained the service.

The decree under consideration is not in conflict with the decisions of this court cited by petitioner, *The Steamer Syracuse*, 12 Wall. 167, and *Compania de Navegacion* v. *Ins. Co.*, 277 U. S. 66. Neither involved an agreement similar to the provisions of the pilotage clause on which this case turns.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.